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ABSTRACT

The eleven articles in this collection explore various aspects of freedom of speech. Topics include the lack of knowledge on the part of many judges regarding the complex act of communication; the legislatures and free speech in colonial Connecticut and Rhode Island; contributions of sixteenth century Anabaptist heretics to First Amendment freedoms; the current state of parliamentary members' right to free speech weighed against the Parliamentary body's right to retain confidential information; Spinoza's ideas on freedom of thought and speech; implications for freedom of speech of Herbert Marcuse's theory of freedom; the Supreme Court and the First Amendment, 1976-1977; minority ownership of broadcast stations; the Labadie free-speech collection, the largest such collection in the United States; and a computer-assisted content analysis of the decisions of Justice William O. Douglas on the issues of obscenity and pornography. The volume concludes with a bibliography of materials published in July 1976 through June 1977 that deal with freedom of speech. (GW)

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The H.A. Wichelns Memorial Award for the most significant contribution to the Free Speech Yearbook, established in 1974 to honor H.A. Wichelns, a pioneer in the speech communication discipline and an early advocate of the importance of the speech-law aspect of speech communication:

1977 Award Recipient: David L. Jamison, University of Akron

ON THE EDUCATION OF OUR JUSTICES

William A. Linsley
University of Houston

We are in the midst of the age of litigation. Concerned citizens now seek a judicial opinion to resolve matters once thought to be within the uncontested jurisdiction of the school principal, the news reporter, the mayor, or the store owner. Liability no longer merely occurs to an individual; it seems ever present, only to be discovered by an aggrieved client, a skilled attorney, or a judge whose values, when set down in an opinion, become binding on all who would challenge them. Considering the frequency with which judgments are being pronounced and the impact they have on our lives, it is alarming to learn of the casual regard and even disdain many judges hold for the complex act of communication. We only need to examine several Supreme Court cases to discover the conflict between that which communication theorists profess and that on which courts base their wisdom.

The 1973 case of Kaplan v. California, 413 U.S. 115, squarely presented the issue of whether expression by words alone can be legally obscene when unprotected by the First Amendment. Chief Justice Warren Burger, frustrated by the difficulty of establishing a connection between symbolism and behavior, declared, "States need not wait until behavioral experts or educators can provide empirical data before enacting controls over commerce in obscene materials--we have noted the power of a legislative body to enact such regulatory laws on the basis of unprovable assumptions." Burger chooses not to be burdened by the locus of meaning or factors of multiple causation which might confuse what judges and legislators prefer to believe. Burger needs to be asked what is wrong with waiting for empirical data. Should not the lack of data dictate no restrictions on communication rather than presumptions of causality linking symbolism with some mental taint?

In Lewis v. New Orleans, 415 U.S. 130 (1974), Justices Harold Blackmun, Burger, and William A. Rehnquist ignored the varying influences of human experience when they interpreted the meaning of symbols and attacked the practice of voiding statutes for reasons of overbreadth and vagueness. They called these "rubber stamps attuned to the easy and imagined self-assurance that one man's vulgarity is another's lyric" (emphasis mine). The Court seems to imply that all speech may be denotative and that statutes referring to "lewd and opprobrious" language can communicate the same things to everyone. The Court needs to be asked just how "imaginary" it is for meaning to be personal rather than universal.

If the Kaplan and Lewis cases cause you no distress, consider Kleindienst v. Mandel, 408 U.S. 753 (1972). Mandel, a Belgian, was invited to debate and interact with American scholars. Upon denying Mandel a nonimmigrant visa Supreme Court Justice Blackmun, joined by five of his colleagues, alluded to the government's contention that the scholars' rights to hear, speak, and debate with Mandel are inapplicable because they have access to his books and because technological developments such as tapes or telephone hook-ups readily supplant Mandel's physical presence. The Court ignored that speaking and listening are inseparable freedoms, that speakers listen and listeners speak, and that advantages inherent in face-to-face debate, discussion, and questioning are not found in written or taped communication.

What we in speech have long known about communication needs to be compellingly demonstrated to the courts--and by us. Further, we need to develop the empirical data so well that legislative bodies cannot act capriciously by relying on Burger's charge to legislate on the basis of unprovable assumptions. We must examine how courts perceive communication. We should study the accuracy and validity of these perceptions. And we must use our findings to challenge the reasoning presently found in judicial opinions. Without our expertise in understanding the communication process, the next time when interests are balanced out the advantages and rights inherent in oral communication will surely lose, as happened in the Mandel case.

FROM SMALL ACORNS MIGHTY OAKS GROW: THE LEGISLATURES AND FREE SPEECH IN COLONIAL CONNECTICUT AND RHODE ISLAND

J. Louis Campbell III
University of Minnesota

In 1960 Leonard W. Levy, first incumbent Earl Warren Professor of Constitutional History at Brandeis University, declared in his Legacy of Suppression: Freedom of Speech and Press in Early American History: "This book represents a revisionist interpretation of the origins and original understanding of the First Amendment's clause on freedom of speech and press. I have been reluctantly forced to conclude...that American experience with freedom of political expression was as slight as the theoretical inheritance was narrow. Indeed, the American legislatures, especially during the colonial period, were far more oppressive than the supposedly tyrannous common law courts."[1]

Dr. Levy lays waste to a tradition that many Americans have long held dear: that our Union has from its earliest settlement treasured the ideal of freedom of expression: "The persistent image of colonial America as a society in which freedom of expression was cherished is an hallucination of sentiment that ignores history....The American people simply did not understand that freedom of thought and expression means equal freedom for the other fellow, especially the one with the hated ideas."[2] Tracing "The American Colonial Experience," Levy mentions the role of common-law courts and royal governors in restricting free expression. But he develops his contention that "The most suppressive body by far...was that acclaimed bastion of the people's liberties: the popularly elected Assembly."[3]

Part I

Though Levy spends his greatest effort on Massachusetts, New York, and Pennsylvania, he indicates by example that regulation of liberty to speak and print occurred throughout the colonies. His spacial sweeps are at times broad, and his coverage thin.[4] Notable omissions from his colonial treatment are the colonies of Connecticut and Rhode Island, Delaware, and New Jersey. The present research tests Levy's thesis that Americans inherited a legacy of suppression by examining in detail the records of the colonies of Connecticut and Rhode Island. According to Horatio Rogers, "The colonial charter of Rhode Island...was unsurpassed in liberality. That of Connecticut alone approached it, and in these two colonies only, until after independence, were the governors elected by the people. So liberal were the royal charters of these two colonies that they alone survived the Revolution, Connecticut abandoning her charter in 1818, and Rhode Island clinging to hers until 1842."[5]

Further reports of historians are quite favorable in regard to the role of Connecticut in the dawning of American independence. John Fiske argues that "The government of the United States today is in lineal descent more nearly related to that of Connecticut than to any other colonies."[6] Charles Edward Perry lauds Connecticut as bringing forth "the first attempt, in the history of this country, to draft a frame of popular self-government...."[7] Herbert L. Osgood identifies political independence in Connecticut as "even more prominent than was commercial and territorial isolation...."[8] Clinton Lawrence Rossiter, though denying that Connecticut was a democracy, declared that it was an unmistakable step away from the Massachusetts oligarchy and toward a free society.[9] And J. Mark Jacobson considers that Connecticut advanced the development of democratic seeds.[10] The loyalists of the period were not unmindful of Connecticut colonists: "Sedition, said the Tories and British, flowed from their pulpits and through the public prints."[11]

Rhode Island is seen in no-less-stellar light. "Freedom of speech is necessarily affected by the exclusion of aliens for their opinions."[12] And, rather than exclude individualism, Rhode Island encouraged it.[13] This atmosphere led to fiery political discourse, "name calling and calumny," which were thought by many to be "part and parcel of self-government."[14]

The Islanders of Roger Williams codified in their first charter their belief that all men were equal and could aspire to public office; all could meet in public assemblies. They also required that before each law could take effect, it had to be approved by citizens in their public meetings.[15] The first Articles of Agreement were adopted in Providence in 1640. According to Arnold, "The largest liberty of the citizen, civil as well as religious, consistent with the existence of society, was their cherished object....Latitude of opinion upon fundamental points of civil government still existed. Theories subversive of all legal restraint were broached...."[16] The General Assembly, meeting on May 19, 1647, recorded: "It is agreed by this present Assembly, thus incorporate, and by this present act declared, that the form of government established in Providence Plantations is DEMOCRATICAL, that is to say, a government held by the free and voluntary consent of all, or the greater part of the free inhabitants....And otherwise than thus, what is herein forbidden, all men may walk as their consciences persuade them, every one in the name of his God."[17] Samuel Greene Arnold finds that the democratic proviso "was no less novel and startling to the statesmen of that day, than was the idea of religious freedom...."[18] Rhode Island maintained its vanguard position on May 4, 1776, when it became the first colony to declare its independence.[19] And when the Islanders ratified the Constitution, they were so concerned about the absence of a free-speech clause that they included one in their ratification.[20]

Thus, we have a significant body of circumstantial evidence that shows Connecticut and Rhode Island to be generally more favorable to individual liberty than their sister colonies. If it is found that even in these two most liberal colonies there was a significant degree of suppression of speech, then Levy's thesis must be confirmed. However, if Connecticut and Rhode Island resist Levy's interpretation of evidence obtained elsewhere, we must conclude that Levy has overgeneralized and neglected to note important differences in the colonies.

The present study should be viewed in light of two limitations: First, only freedom of speech, as opposed to freedom of the press, is considered. Second, only _de jure_ restrictions are covered -- that is, only structural bounds and applications of those bounds originating with the legal system and legislature.

The general assemblies are pinpointed by Levy as being the agents of most-repressive measures _vis-a-vis_ freedom of expression. So let us first answer the question: Were the assemblies of Connecticut and Rhode Island the primary sources of restrictions on speech in those colonies? The evidence leads to an affirmative answer.

There was a minimum of royal authority in Connecticut. Indeed, Connecticut was not a royal colony. It was established without the authority of the King, and his influence was not foremost militarily, diplomatically, or commercially.[21] Connecticut was a corporate colony formed when dissenters separated from Massachusetts and farmers sought richer lands.[22] Connecticut, along with Rhode Island, existed

> largely beyond the limits of English knowledge, for neither the Privy Council, the Board of Trade, the Treasury, nor the Admiralty had much information about them, either how their people lived, how their governments carried on business

> and acquired revenue, or how their towns managed local affairs. Between the mother country and these colonies there was little communication, as far as administration and finance went, for the King had no power to appoint any of their officials or to concern himself with their legislation, unless clearly contrary to the laws of England.[23]

The assemblies in Connecticut and Rhode Island had the real power.[24]

We now have ground to compare Levy's colonies with two of those he neglected -- the two most liberal of all. If we find that Connecticut and Rhode Island were more liberal with respect to free speech, we have discovered new benefactors and the true legacy of liberty.[25] Now, throughout the voluminous colonial records of the two colonies there appear four areas of limitation on absolutely free speech: provision for parliamentary order, protection against criticism of the colonial government, promotion of the established social order, and guidance of religious beliefs.[26]

Restrictions to Suppress Free Discussion in Representative Bodies of Government

The legislatures made rules regarding in camera speaking. In Connecticut, for example, the members had parliamentary privilege: that is, they had general freedom of speech while the Assembly was in session, exclusive of treasonous declarations.[27] The Code of Laws of 1650 stipulated: "It is ordered by this Court that whosoever doth disorderly speak privately during the sitting of the Court, with his neighbor, or two or three together, shall presently pay twelve pence, if the Court so think meet."[28] To further promote decorum among its members the Assembly fined anyone who spoke without first being recognized the sum of one shilling.[29]

Rhode Island also felt the need to maintain order in its deliberative bodies. For example, on May 16, 1648, for "the Good Order of the Assembly" the legislators voted that "every man shall have liberty to speak freely to any matter propounded yet but once, unless it be by lease from ye moderator...he that stand vp first vncovered shall speake first to the cause."[30] That cool deliberation was not always preserved is evident from a restriction of June 30, 1655. The Assembly declared that, "'in case any man shall strike another person in ye Court, he shall either be fined ten pounds, or be whipt, accordinge as ye Court shall see meete.'"[31]

Both colonies enacted measures to deal with indecorous speech in town meetings. On May 8, 1729, the Connecticut Assembly promulgated legislation entitled "An Act to prevent Tumults and Disorders in Town Meetings, Society Meetings, and Proprietors Meetings." Fines were prescribed for persons vilifying the moderator or speaking out of order.[32] If one suspects that there was much agitation in the deliberative meetings of Rhode Island, one is correct to the letter of the law. For on May 19, 1647, the Rhode Island Assembly ordered "that all cases prsented, concerning General Matters for the colony, shall be first stated in the Townes...that is, when a case is propounded, the Towne where it is propounded shall agitate and full discuss the matter in theire Town Meetings..."[33] And discussion was plentiful as well as fierce debate.[34] The Island Assembly enacted at least one law giving moderators power to keep the peace in town meetings -- a broad delegation of power under which probably came restrictions on speech.[35]

The Rhode Island Assembly allowed for dissent in its deliberations. Within Assembly sessions dissents or protests by members to Assembly action could become pointedly hostile. Referring to various acts, Benjamin Ellery and Peter Bours used the words "very injurious to the colonies,"[36] William Ellery and others used the phrase "highly unjust,"[37] Samuel Wickham and friends warned of "most pernicious consequence,"[38] Peter Bours and Edward Scott issued claims of manifest absurdity, unreasonableness, and injustice,[39] and Samuel Ward charged a "violation of the Act of Parliament, and a breach of the faith of this government."[40] Colony administrators did not always mince words regarding England, either. Governor Samuel Ward of Rhode Island was the only colonial governor to refuse to take an oath to sustain the Stamp Act.[41] The Assembly ordered an anonymous speech attacking England to be printed in the records on November 30, 1784.[42] For all the blunt language no retribution was exacted from those who dissented and criticized.[43] Rhode Island did, however, ask a small compensation for printing the dissents, i.e., two shillings.[44] The privilege of dissent in that colony obtained for mid-echelon officials as well: "'if any magistrate on ye bench dissent from ye rest of ye magistrates,'" he could have it recorded for eighteen pence.[45] It has been speculated that these charges may have reduced the number of dissents recorded,[46] though not necessarily voiced.

Secrecy was a salient concern of Connecticut leaders. In the debate over the Fundamental Orders "strict secrecy" was imposed, and no records were made of the issues raised therein.[47] The Assembly formalized its precept of silence in October, 1639[48] and again in the Code of Laws, 1650, when it declared "that whatsoever member of the General Court shall reveal any secret, or shall make known to any person what any one member of the Court speaks concerning any person or businesses that may come into litigation in the Court, shall forfeit for every such fault ten pounds, and shall be dealt otherwise withall at the discretion of the Court."[49]

Thus, we have seen that the legislatures under study made provisions for parliamentary order which affected free speech. But the classes of provisions discovered are not unconscionable. They do not impact on free speech in an evil manner. Further, Connecticut and Rhode Island seem more liberal, judging by Levy's work, than the other colonies. Levy declares that "None of the available evidence suggests that freedom of speech or press existed before the revolutionary controversy."[50] As partial proof he cites two examples where government officials were punished for dissenting speech during official functions.[51] Connecticut and particularly Rhode Island, where dissents were officially publishable, were clearly more liberal and suggestive of freedom of speech. We are now ready to move on to a second motive the legislatures had to bind speech: they wanted to protect the colonial governments from unbridled public criticism.

Restrictions to Protect the Government Against Criticism

In 1642 Connecticut enacted a law forbidding advocacy of the forcible overthrow of the government. The penalty was death.[52] In 1675 the penalty was downgraded to other punishment.[53] No case was discovered which was brought specifically under this statute. In numerous cases adjudicated by the Connecticut legislature it had taken offense at a colonist's speech. The case of Richard Gyldersly is typical. On June 11, 1640, Gyldersly was found guilty of "casting out pernicious speeches tending to the detriment and dishonor of this commonwealth." He was fined forty shillings and required to post a bond of twenty pounds to guarantee his appearance at the next session of Court.[54] Sundry reports raise the issues of scandalous allegations, distempered speeches, loud language, defamation of the Assembly. A few accounts are more specific:

On May 17, 1715, in a public session of the General Assembly and Court of Election, Captain Joseph Wadsworth challenged the validity of the Assembly's acts _vis-a-vis_ the Charter of Connecticut. He was subsequently brought before the bar of the Assembly "and behaving himself with due submission" was forced to publicly declare: "I do sincerely profess... I had no design to reflect or expose the proceedings of the ...Assembly... If what I said had any tendency thereunto, it was more than I intended or perceived; and I am heartily sorry that what I said was of such tendency as to give offense to this Assembly, for which, as for the Charter, I had a great regard and honor."[55]

The Assembly was sensitive to the words of one William Leet. He declared that he could either bully them verbally or intimidate them by sword; he charged one member, "You are a lying, scounderling, ill-bred fellow." The Assembly ordered Leet arrested.[56]

Preacher Benjamin Pomroy certainly gave the Assembly cause to spring into action. It did so. On May 10, 1744, he was convicted for having said, among other things, that "the state law of this colony, made concerning ecclesiastical affairs, was a great foundation to encourage persecution...that the great men had fallen in and joined with those that are on the devil's side and enemies to the kingdom of Christ...there is no colony so privileged as Connecticut was, and now there is no colony so bad as Connecticut for persecuting laws, I never heard nor read of such persecuting laws as in Connecticut, nay there is no such thing among the heathan...."[57] In the face of such inciting utterances one would expect Pomroy's fate to have commenced with drawing and quartering. But the Assembly was content to slap the wrist of this man of the cloth. It required him to post a bond of fifty pounds, to be returned to him at the end of the session if he maintained equable conduct.[58]

Public apology to the Court was frequently required. "To resist in any way the authority of the people's representatives was a serious matter. The man who submitted humbly was more common than the one who did not; and the one who did not do so at first was likely to be very humble indeed before the incident was over."[59]

Though Rhode Island had structural protection for some dissent, the legislature's record in tolerating dissent is not spotless. By 1672 Islanders had been tumultuous in their opposition to series of new taxes. The Assembly bristled at this resistance and expressed its outrage in the first Sedition Act in the colony:

> ...if any person or persons in any town or place within this jurisdiction, shall at any time more especially in any town meeting or other publique assembly of people, appear by word or act, in opposition to such rates and impositions, made from time to time by the General Assembly of this Colony, or shall appear in opposition against any of the Acts and Orders of such Assembly made accordingly to the Charter, by speaking against such Acts or Orders openly, in any concourse of people together, or that shall move to the rejecting such Acts and Orders when published in any such meeting in any town or place, or that shall endeavour by word or deed to send back or otherwise to slight such Acts and Orders; all and every such persons shall be questioned and proceeded against as for high contempt and sedition....[60]

The punishment for violation was a fine of up to twenty pounds, whipping up to thirty stripes, or imprisonment of up to twelve months.

It has been suggested that the Assembly did not act out of an evil purpose. Land disputes with Connecticut, Indian wars, and internal dissension were justifications for the reactionary measures of the Assembly.[61] Notwithstanding circumstances the people of Rhode Island were emphatic in their resentment of the strong-arm tactics of the Assembly, and applied the ultimate political remedy: Shortly after the Sedition Act of April 2, 1672, elections were held, and the Assembly members were replaced.[62] On May 14, 1672, the new Assembly voted to repeal the Sedition Act, "forasmuch as severall acts and orders were made in the Generall Assembly in the Aprill last, some whereof seeminge to the infringeinge of the libertyes of the people of this Collony, and setting up an arbitrary power, which is contrary to...the fundamentall lawes of this Collony from the very first setling therof...."[63] Thus, declared contrary to the essence of Rhode Island, the act had a life of little more than one month.

In 1699, during border disputes with Connecticut, the Assembly enacted a second Sedition Act.[64] Unpopular again, the act was repealed on March 24, 1701/1702.[65] Though not officially labeled sedition, a law passed on March 30, 1761, called for a fine of five pounds or imprisonment for thirty days for anyone convicted of dissuading a colonist from joining the Rhode Island army. Persons convicted of persuading an Islander to join the army of a neighboring colony were to be fined twenty pounds and jailed until the next court session of that county.[66]

The Island Assembly also passed laws under the rubric "An Act for Punishing Criminal Offenses" which demanded that respect (including speech) be shown by nonofficers to officers of the colony[67] and by inferiors to superiors.[68] But even before these laws the Assembly began exercising some overseership as early as 1640. Samuel Gorton was sentenced to be whipped and banished from the Island after he challenged the Court's right to exist without royal authorization, called the magistrates asses and the deputy governor "an abettor of riot" and "unfit to make a warrant," charged the judges with being corrupt and "wresting witnesses," called a freeman a "jack-an-apes," and made ungentlemanly aspersions about one of the female witnesses.[69] In one case the Assembly wrote to the entire town of Warwick, "protesting against such expressions as tending to discredit the authority of the Assembly, thereby weakening the government....[70] That the Assembly did not always take a dim view of criticism is illustrated by an incident of May 16, 1671. The Court of Justices, sitting under the authority of the Assembly, was interrupted by a group of people challenging the authority of Rhode Island and favoring that of Connecticut. The justices were willing "to pass it by as an act proceeding only from some vnruly passions."[71] The Assembly did not review the case.

Clearly Connecticut and Rhode Island legislatures were sensitive to criticism, as are Congress and the state legislatures today. But, compared with the colonies studied by Levy, they tended to be more liberal. For example, Levy cites Massachusetts' suppression of advocacy of the election of rulers.[72] In Connecticut and Rhode Island popular choice of officials was mandated. Levy declares that the legislature was the "unexpectioned superior" in clashes with free debaters;[73] but in Rhode Island almost an entire Assembly was replaced when the colonists resented strong-arm measures regarding free speech. Even that Island law, as it stood, was more tolerant than sedition laws in some other colonies. It called for limited fines, imprisonment, or whipping, while a Virginia proclamation cited by Levy in his proof threatened loss of life or limb for seditious speeches. Thus, contrary to Levy's thesis that "Freedom...did not include a right to criticize the legislature..."[74] we have found that some freedom, even if imperfectly measured, indeed existed in Connecticut and Rhode Island. Let us now move on to the third area of restrictions on free speech: those promoting the social order.

Restrictions to Promote the Established Social Order

When Connecticut was first established, laws were promulgated to meet the most immediate needs. Relations with native Americans were a pressing concern at that point. Hence, the General Court, acting at Hartford, March 8, 1637, ordered that "no commissioners or other persons shall bind, imprison, or restrain, correct, or whip any Indian or other, nor give them any threatening or menacing speeches..." unless provoked by an Indian assault on person or property.[75]

As the colony became better organized, the governing body enacted a code of laws specifying the crimes for which a person would forfeit his life. On December 1, 1642, the General Court adopted the "Capitall Lawes," of which three dealt with the spoken word. Law eleven dealt with bearing false witness; Law twelve, with advocacy of the overthrow of the commonwealth (the English monarchy was not mentioned); and Law three, with blasphemy: "If any prson shall blaspheme the name of God the Father, Son or Holy Ghoste, with direct, expres, prsumptuous or highhanded blasphemy, or shall curse God in the like manner, he shall be put to death."[76] Biblical verses were cited in support of each stricture in the capital code.

In 1650 the Ludlow Code was enacted, adding several articles to the "Capitall Lawes." Among them was Law thirteen: "If any childe or children above sixteen yeares old and of sufficient vnderstanding, shall curse or smite theire natural father or mother hee or they shall be put to death...."[77] The only justification a child could plead under the law was that his parent or parents had been "very unchristianly negligent" in providing education for said child or had exercised such "cruell correction" that the child was in danger of death or maiming.[78] The year 1675 saw a moderation of penalties prescribed in "Capitall Lawes." A blasphemer, under the 1675 revision, was to be reprimanded by "having his tongue bored through with a red hot iron..." as opposed to the presumably harsher 1642 penalty of death.[79]

By 1712, as Connecticut continued to grow and as transients and nonestablishment persons became more numerous, the General Assembly apparently felt the need to reiterate its role in providing for the welfare of its people in the area of oral expressions. To wit, in a law entitled "An Act for the Correcting and Restraining of Rogues and Vagabonds, and other Persons of Evil Name and Fame, for Rude and Prophane Discourse, etc.," the Assembly moved against "wanderers and others, who have by their vile and prophane discourses and actions proved a snare to youth especially, and tend to the great detriment of religion, being of pernicious consequence....[80] In applying such laws the Connecticut Assembly acted as a kind of colonial vice squad, sanitizing the colony's moral fiber by punishing liars, cursers, swearers, and others whose speech posed a danger of "infection to others." For example, on August 22, 1665, Robert Pinion was convicted of lascivious and corrupt speeches in that "he spake many things of making maids loving of him and kissing him in the stocks, and that he said to [Joshua Bradley's] sister that had he but half hour's speech with her he could make her come to him [if he were in the stocks] and kiss him, to which she said, do you go and sit in the stocks and see if I will come to you...."[81] Pinion was sentenced to a whipping to serve as a "future warning and terror to himself and others...." Samuel Ford made the mistake of asking a young pregnant wife to sleep with him for only half an hour. The Court sentenced him on October 1, 1667, to a whipping and required him to pay the husband of the girl ten shillings for the husband's trouble.[82]

Edward Vickers, a runaway slave, was charged with "cursing and swearing, and...giving threatening speeches against the Clark of the ironworks."[83] Vickers confessed that he had cursed and pleaded for mercy. He argued that he had fallen in with the wrong crowd. The Court was unmoved, however, and ruled: "The Court upon the evidence present...do find him rightly guilty of common and frequent cursing and swearing in a most prophane and blasphemous manner, horrible to be heard or uttered, and the like not formerly known among us, to the great dishonor of God and the danger of infection to others...."[84]

Typical of the defamation suits in which colonists were litigants before the Assembly was the case of Josiah Wilkinson v. George Tong and wife. Wilkinson charged the Tong couple with slander after the couple accused him of operating a whorehouse and being a rogue and liar. He won a fifty-pound judgment.[85] Apparently Mr. Tong disapproved of the decision, for "shortly thereafter the Court fined Tong another ten shillings for cursing. Plaintiffs and defendants minced no words even before the bench."[86]

Rhode Island's Assembly provided for social order in similar fashion. For example, slander was a major topic of legislative concern and vividly scorned. "Forasmuch as a good man is better than precious ointment, and slaunderers are worser than dead flies to corrupt and alter the savour thereof, it is agreed...to prohibitt the raysing and spreading of false rports...."[87] Examples of what constituted slander were given: "to Say A man is a Traytor a fellon a thief a cutpurse...a Bankrupt...a young man Unmarried a whoremaster and to say a man keeps a house of Baudery...."[88]

Another legislative concern was cursing. Cursing, "notorious and customary," was against the law.[89] Additional statutes that regulated speech dealt with perjury,[90] children's and servants' respect for their parents and masters respectively,[91] vexatious lawsuits,[92] conspiracy,[93] and what today might be considered the "symbolic speech" of Indian dances.[94] Incidents in which colonists were involved in defamation suits were also similar to those found in Connecticut.[95]

A comparison with the results of Levy's study is impossible because Levy concerns himself only with political expressions. Nevertheless, one might conclude that the morality-type restrictions were less sinister than the political-type and thus not subsumed under the forboding "legacy of suppression." We must also consider the taut Puritan culture that frowned on one who "spake many things of making maids loving of him" and resist judging by the criteria of our more-permissive age. While neither lying (except perjury) nor cusing nor lewd and lascivious language are now proscribed, defamation of character is still very much a cause for legal redress. Reasonably enough, one citizen cannot destroy the reputation and good name of another without penalty.

The final motive for restricting free speech was to support religious beliefs. Because variety of worship was tolerated in Rhode Island, this motive was found to exist only in Connecticut.

Restrictions to Support Religious Beliefs

Connecticut was emphatically Protestant. And Protestants had a good measure of liberty in speech on religious matters. For example, in 1744, Elisha Williams, speaker of the Connecticut Assembly and former president of Yale, "brilliantly pleaded for the right of private judgment without any control from civil authority, not only as to affairs of conscience but on all issues."[96] He declared for "the Right that every one has to speak his Sentiments openly concerning such matters as affect the good of the whole."[97] Non-Protestants, however, were less favored in Williams's universe.[98]

The tolerance of the Assembly in regard to Protestants' religious jousts can be seen in the case of the Reverend Mr. Stow, fired by the Assembly on March 4, 1660, from his ministry in Middletown.[99] During the decade between 1650 and 1660 a good deal of turmoil existed in the churches of Windsor, Wethersfield, Hartford, and Middletown. This contention "gave opportunities for a good deal of free speaking."[100] During the bouts Stow was charged with having said that "'those that were not in visible covenant were dogs and among dogs and in the Kingdom of Sathan and at Sathan's command.'"[101] Though the Court deprived Stow of his official pulpit, it went on to declare that he "is not infringed of his liberty to preach in Middletown to such as will attend him, until there be a settled minister there."[102]

The only case of capital punishment discovered in this research was the case of an unnamed woman hanged in 1663 for calling Christ a bastard.[103] Other penalties were far milder. Any Christian who acted "contemptuously...toward the word preached or the messages thereof....by interrupting [the preacher] or by charging him falsely with an error..." was to be censured upon the first offense; a second offense called for a fine or standing "two hours openly upon a block or stool four foot high, upon a Lecture day, with a paper fixed on his breast written with capital letters, 'AN OPEN AND OBSTINATE CONTEMNER OF GOD'S HOLY ORDINANCES,' that others may fear and be ashamed of breaking out into like wickedness."[104] This issue of punishment for speech provides a good basis for comparing perspectives on free speech in England, Levy's colonies, and Connecticut and Rhode Island, with the assumption that the degree of punishment is some indication of the considered degree of seriousness of the offense.

From earliest times free speech had some restriction in England. Slander was a civil offense, pitting person versus person, while slander of the King and other government officials might be punishable as treason.[105] In 1275 Edward I decreed that "from henceforth none be so hardy to cite or publish any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm...."[106] Statutory control of speech continued throughout English history.[107]

Punishments cited as exemplary are stunning. Quaker James Nayler was granted mercy in 1656 on a charge of blasphemy. His punishments were: two hours in the pillory at Westminster, from whence he was to be whipped by the hangman into the town Cheapside, there to be pilloried two hours "for the sport of another mob," after which he was to have his tongue burned through with a hot iron and his forehead branded with the letter B.[108] Fines were at times extravagant: for example, ten thousand pounds down to five hundred pounds.[109] Some sentences combined fines and corporeal punishment: Samuel Johnson was fined five hundred marks, pilloried three times, and whipped from Newgate to Tyburn.[110] If one persisted in caustic or impudent address, one might suffer unusual detriment. In 1637 John Lilburne began a sixteen-year ordeal, during which the Star

Chamber fined him five hundred pounds, raised "two hundred bloody welts" on his back. The House of Lords fined him four thousand pounds and sentenced him to seven years in prison. Parliament fined him three thousand pounds and exiled him for life; Cromwell tried him for treason in 1653.[111] Though Lilburne was acquitted, he had suffered greatly for his remarks. Historians record that next to the stark nature of British intolerance was the frequency with which it was expressed. Between April 30 and November 28, 1684, there were sixteen trials involving seditious expressions.[112]

In the colonies surveyed by Levy punishments were also stiff. Levy cites a fine of one hundred pounds levied on one Buckner[113] plus a fine of fifty pounds coupled with a bond of one thousand pounds.[114] Shades of English brutality were discernible. Branding, boring through the tongue, and death are cited by Levy as having in fact been administered to punish speech.[115] Levy concludes that the evidence "suggests that open political debate had been scotched..."[116]

By comparison Connecticut and Rhode Island were more liberal. Penalties for the various offenses were at times harsh in the letter of the law. But capital punishment occurred only once -- when a person described Christ as a bastard. Boring a hole through the tongue with a red-hot iron was prescribed by law as punishment, but no case applied such torture as a remedy. Fines seem to have been the commonest form of retribution. A fine of ten or twenty pounds for many offenders was difficult to bear. However, "the gradations of wealth among Connecticuts population...were moderate and the majority of farmers within it was overwhelming."[117] Examples of salaries of nonfarmers paid by the legislature may shed light upon the severity of some of the fines assessed by the same body. The salary for the keeper of the House of Correction in 1650 was ten pounds a year.[118] In 1655 Daniell Porter was retained as the colony's surgeon at six pounds a year plus a few shillings per case.[119] In a letter to the General Assembly dated October 10, 1745, Timothy Green requested full payment of his annual salary of fifty pounds a year for printing government publications.[120] And Jeffrey Amherst wrote a letter to Thomas Fitch (dated February 21, 1762) offering five pounds as an inducement for men to join the army.[121] Thus, it appears that some fines levied by the Assembly were equal to annual salaries paid by the same bodies. It is at least conceivable that the coincidence was not accidental. Fines may have been assigned with an eye to the legislative budget. The absence or diminution of punitive designs in writing statutes and handing down sentences would conform with the thesis of this article that Connecticut and Rhode Island departed from the examples of suppression in the mother country and sister colonies.

Other penalties were imposed as well. Sitting in stocks and public whippings were not infrequent sentences among the cases cited herein. "Public humiliation proved to be an effective deterrent to future crimes in many cases."[122] Some jail sentences were imposed.

In Rhode Island fines were the most frequent form of punishment.[123] Imprisonment, whippings, recantation, and an occasional deprivation of franchise[124] may also be found in the records.

Thus, compared with England and those colonies studied by Levy, Connecticut and Rhode Island were clearly milder in treating violations of their restrictions on speech. During a seven-month period in England there were sixteen cases punishing speech. In the one-hundred-forty-year period for which Connecticut and Rhode Island were studied there were fifty-four discovered cases: thirty in Connecticut and twenty-four in Rhode Island. The legislature of Connecticut was the aggrieved party in only fourteen cases in one hundred forty years; that of Rhode Island in nineteen cases. In other words, in 1640 times the period there were only 3.375 times the number of cases in the colonies as in England. The facts that fines were as much as ten times severer in those other places, and corporeal abuse more frequent and drastic; that there was a wide gap between statutory punishments and those applied; that there were reductions in statutory sentences; that there was less-frequent prosecution -- all these suggest that decriminalization of free speech was under way in Connecticut and Rhode Island.

"This case and the others which have been reviewed indicate that liberty of expression in principle or practice barely existed, if at all, in the American colonies during the seventeenth century. By 1763, the situation was substantially unchanged...."[125] Levy's conclusion may be true for the colonies he surveyed; but, regarding speech, Connecticut and Rhode Island were different. The founders of these two colonies were, in large measure, dissidents who left Massachusetts Bay in opposition to the severe limitations placed on personal freedoms therein. They established popular systems of government, under which expression was freer. Part II of this essay will offer a theory as to how the soil in Connecticut and Rhode Island nourished free speech.

Part II

I have argued that in practice Connecticut and Rhode Island were more liberal in allowing freedom of speech than the other colonies and that, therefore, Leonard Levy was careless in locating the source of our legacy as well as in characterizing that bequest. It now remains to explain, in rhetorical terms, why these two colonies proved best able to give impetus to the development of free speech as we know it.[126] The theory of rhetorical vision was advanced by Ernest Bormann in "Fantasy and Rhetorical Vision: The Rhetorical Criticism of Social Reality."[127]

According to Bormann a rhetorical vision is a symbolic reality, which serves large groups of people "to sustain the members' sense of community, to impel them strongly to action (which raises the question of motivation), and to provide them with a social reality filled with heroes, villains, emotions, and attitudes."[128] This symbolic reality is the result of a set of fantasy themes that have caught on in a group of "people with similar individual psychodynamics" who have met "to discuss a common preoccupation or problem. A member dramatizes a theme that catches the group and causes it to chain out because it hits a common psychodynamic chord or a hidden agenda item or their common difficulties vis-a-vis the natural environment, the socio-political systems, or the economic structures."[129] A form of the vision thus produced is promulgated in consideration of a different and larger audience. As the vision emerges as a unified construct, dramatis personae are identified as reference persons who can be expected to generate the original emotional feeling. The dramatic situation can touch people to the extent that individuals will be transported to an idealized world, responding as they would to a work of art. Stirred, these people act: "The rhetorical vision of a group of people contains their drives to action. People who generate, legitimize and participate in a public fantasy are...'powerfully impelled to action by that process.'"[130] With this in mind a critic can predict the behavior of participants. That behavior will fulfill the value aspirations of the vision. What has this to do with free speech? Can we use Bormann's theory in studying a legal system of free speech? The answer is yes.

According to Thomas Emerson, Lines Professor of Law at Yale University, "a perfect set of legal rules and an ideal array of judicial institutions could not by themselves assure an effective system of free expression. Many other factors are critical. There must be a substantial consensus on the values and goals of the society -- some minimum area of agreement or acquiescence."[131] In other words, there must be a vision, a symbolic reality, to sustain a sense of community. Among other prerequisites, according to Emerson, are an economic system that provides a broad base of sharing of the wealth and political institutions with some basis in tradition, some degree of acceptance by the people, and the capability of adjustment and change.[132] Emerson affirms the importance of communication (or dramatization) as reinforcement when he says: "...the theory of freedom of expression is a sophisticated and even complex one. It does not come naturally to the ordinary citizen, but needs to be learned. It must be restated and reiterated not only for each generation but for each new situation...."[133] Thus, a vision analysis is appropriate to this study. Let us now proceed to isolate two fundamentally different colonial visions: the royal vision and the democratic vision.

Rossiter has identified two types of colonies: those established by royal authority and those established without it. In the royal colony the body politic was one in which "the crown was immediately supreme and sovereign. In theory, all officials and institutions existed at the pleasure of the King."[134] Eleven of thirteen colonies were thus influenced by the crown. The two remaining colonies -- Connecticut and Rhode Island -- were founded without royal authority.[135] They governed independently of the crown. One Boston Tory wrote -- and "not too far from the truth" -- that "'The people in those Colonies chuse their Governors, Judges, Assemblymen, Counsellors, and all the rest of their officers; and the King and Parliament have as much influence there as in the Wilds of Tartary.'"[136] Where the King and Parliament did have a significant role the royal vision obtained. The themes susceptible to dramatization were a kingship with a tincture of divinity; an established church; a hereditary peerage and the House of Lords; a Parliament supreme over other branches of government; and the suppression of freedom of speech, press, and religion.[137]

It is important to know the foundation of the English policy of restricting expression. That foundation was the divine fantasy that surrounded the King and his government. Because the Monarch and his government were transcendental in nature (this was reinforced by the King's role as head of the Church as well as the government), they were superior to ordinary persons and immune to criticism.[138] This divine fantasy obtained among the institutions in the colonies except Connecticut and Rhode Island. The difference is the essence of the writer's argument.

Connecticut was founded as "one farther step removed from English oversight, a colony in which the fermenting process of self-government could take place with the least possible interference from the home country."[139] It was "symbolically,...the first overt indication of the popular urges [fantasies] beneath" autocratic Puritanism and royal government.[140] Part of this symbolic reality or vision, founded by people with similar psychodynamics, was the American "Spirit of political liberalism."[141] The vision was promulgated to others by documentary means as well as the spoken word. The independent constitution of Connecticut, called the Fundamental Orders of Connecticut,[142] failed to pledge allegiance to the King (whether "dread sovereign" or "gracious king"), Lord Protector, Colony of Massachusetts Bay, or any other outside force.[143] Thus, symbolically, rhetorically, the colonists separated themselves from the divine fantasy, which in England and the other colonies was the center piece of the government's claim to immunity from criticism.

Rhode Island also broke with the royal vision. As a result of rhetoric of which history deprives us, a document was promulgated in 1640, setting the fantasies of a small group of people into a symbolic whole: "It is ordered and unanimously agreed upon that the Government which this Bodie Politick doth attend unto in this Island...is a Democracie, or Popular Government."[144] A 1644 patent from England ordered that the Island's laws conform to those of England only insofar as the nature and constitution of the place would allow.[145] In 1647 Rhode Island a constitution was promulgated: "one of the few constitutions in history to proceed directly from the people."[146] "Lenient," "free play," and a "general spirit of democracy and independence" are descriptions applicable to the Rhode Island version of the democratic vision.[147] "The colonial records testify that Rhode Island was the closest thing to democracy in seventeenth-century America."[148] Thus, we have the royal vision, emphasizing duty to King, and the democratic vision, establishing the people as their own rulers. Fantasy themes or dramatizations regarding free speech and lending support to their respective visions might be stated as follows:

> If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority.
>
> If on the other hand the ruler is regarded as the agent and servant, and the subject as the wise and good master who is

> obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with his servant. If others think differently they can take the others side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified. To those who hold this view fully and carry it out to all its consequences there can be no such offense as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offences, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal.[149]

The participants in the royal vision installed the King as the *dramatis persona*. They fantasized themselves in the role of subjects to their King or servants to their master. Thus, they stressed harsh treatment of insubordination. The democratic vision omitted the King as a leading character. Participants dramatized making the servants into masters and assuming responsibility for the household. The crucial difference is royal authority and the consequent fantasy theme regarding free speech under that authority.[150] Now, Levy makes the point that the legislatures of the colonies, especially the popularly elected Assemblies, were most suppressive of speech. How did the royal vision affect these bodies?

In the colonies were "conciliar" organizations of men who exercised executive, legislative, and judicial functions. These councils acted in the legislatures as upper houses, the assemblies being the lower houses. The councils were "often as powerful an agent of royal authority as the governor. The normal method of appointment of councilors was by the Crown, on recommendation of the governor."[151] Thus, sitting as part of the colonial American legislatures were advocates of the royal vision. Proponents of deference to the King and the master-over-servant theme regarding free speech were among those legislating and adjudicating restrictions on expression. And, indeed, though Levy claims that the popularly elected assembly was most suppressive, his evidence is replete with cases from the Governor's (King's) Council and the Governor himself. The assemblies, under the influence of a royal vision and royal agents present to reinforce that vision, may have redrawn the fantasy whereby subjects did not criticize their rulers to one where citizens did not criticize their representatives.

Not so with Connecticut and Rhode Island. I have already established the comparative independence of these two colonies from their beginnings. Now, their legislatures also had councils. But they were free of significant royal influence. In neither colony did the King or Parliament have authority to verify appointments or oversee elections.[152] Members of the councils and assemblies were free of royal interference and elected by the townspeople.[153] In Connecticut loyalists were not even supported by the presence of a royal army to which they could turn, from which they could take strength.[154] Thus, organized under a democratic vision, by which servants became masters in the conduct of government and free of the elsewhere-ever-present influence of agents from the competing rhetorical vision, legislators in these colonies were not constrained to suppress free speech to the same significant degree. Well, in the absence of a royal *dramatis persona* and his agents, who were the *personae* of the democratic vision? Other *dramatis personae* appeared, and their presence was just as important as the presence of the King in the royal vision.

One such *persona* in Connecticut was Thomas Hooker, the founder of that colony. He was highly revered by his fellow colonists: "He was the sage, 'the grand old man,' the philosopher, the accommodator of differences, the typical colonial father."[155] His counsel was sought and advice followed. "He faced toward freedom."[156] Hooker propelled Connecticut to the documentation of its democratic vision when he declared, in a sermon of May 31, 1638, that "the choice of public magistrates belongs unto the people by God's own allowance" and that "the foundation is laid, firstly, in the *free consent* of the people"[157] (emphasis mine). Hooker's central importance is enhanced by the fact that he spearheaded the first attempt at unifying the colonies: the New England Confederation of 1643. The Confederation was the spark of the Albany Congress of 1754 and the first and second Continental Congresses of 1774 and 1775.[158]

One *dramatis persona* of Rhode Island was its founder: Roger Williams. Williams was a "friend of toleration."[159] He was the rod and staff of the "most popular system of government in the colonial period."[160] Williams was of the persuasion that the ultimate source of a civil government's power was God; the earthly "Root of Power" was the people.[161] Thus, in Connecticut and Rhode Island agents of the rhetorical vision stressing uncritical subservience were absent, while *personae* of the vision emphasizing the direct role of the people in the affairs of the state and the servants-over-masters fantasy theme regarding free expression were present.

The question now arises: What sort of responses, if any, did the democratic vision produce among the people? Did it become a work of art, prompting idealistic acts? Yes. In both Connecticut and Rhode Island colonists were motivated to respond in support of their vision. For example, in 1687, James II attempted to seize Connecticut's charter. "While Sir Edmund was bandying threats... in the course of their evening the candles were suddenly blown out, and when after some scraping of tinder they were lighted again the document was nowhere to be found, for Captain Wadsworth had carried it away and hidden it in the hollow trunk of a mighty oak tree."[162] "Charter Oak" is today a cherished historical site in the State of Connecticut. In Rhode Island, when the colony was threatened with economic boycott if it did not proscribe the activities and expressions of the Quakers, colonists remained loyal to their vision and wrote to Cromwell, announcing their intention to remain firm.[163] Rhode Island was the only colony not to enact laws against the Quakers, and Connecticut enacted the mildest of laws.[164]

I submit that the evidence gathered on free speech in Connecticut and Rhode Island is further indication that these colonies were acting out their fantasies, if imperfectly, with regard to the relationship between the governed and the governing. Right reason compels rejection of the notion that in that boisterous period there were only thirty instances in Connecticut where the legislature could act against speech and only twenty-four in Rhode Island, if indeed these legislatures were comparable to those studied by Levy.

Further evidence of the strength of the vision in these two colonies is available. The royal vision eroded as the psychodynamic bond between the colonies and the English deteriorated. The fantasy proscribing criticism of a ruler by a subject faded. In 1735 John Peter Zenger provided material for new fantasies, which spread through the colonies -- fantasies that ultimately raised citizens up from their knees and subservient roles. But they were fantasies that had already begun to be celebrated in Connecticut and Rhode Island. When the coexistence between the royal vision and the democratic vision finally ended, only the democratic vision remained. Only Connecticut and Rhode Island continued their governments essentially unchanged for years after the Revolution ended, Connecticut abandoning her charter in 1818, and Rhode Island clinging to hers until 1842. And the states that were forming a new American Republic formed constitutional governments with Connecticut and Rhode Island as exemplars.

It is one of the greatest ironies of all that early charters granted to Connecticut and Rhode Island by Charles II were made extremely liberal for the purpose of quelling the growing power of Massachusetts.[165] To protect the royal vision Charles II unwittingly confirmed the democratic vision that had developed in Connecticut and Rhode Island -- a rhetorical vision destined to prevail.

The resolution of this research is at hand: Connecticut and Rhode Island were established when persons with psychodynamic bonds left the royal compound of Massachusetts in order to promulgate a symbolic reality that would give greater play to their fantasies concerning citizen government. Led by friends of tolerance, they documented the vision that made servants into masters, silence into sound. When all about them were searching for new scripts after the Revolutionary clamor, Connecticut and Rhode Island alone remained true to their existing rhetorical visions. These two colonies were more liberal with regard to free speech than those colonies studied by Levy because their rhetorical visions, fundamentally different from the competing royal vision, demanded that they be so. In view of the fact that our present government rests so heavily on that same democratic vision, we should recognize that our legacy is one of liberality, not suppression, and that our benefactors are those free spirits who gathered in Connecticut and Rhode Island, that from small acorns mighty oaks would grow.

FOOTNOTES

[1] Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge: Harvard University Press, 1960), p. vii.

[2] Levy, p. 18.

[3] Levy, p. 20.

[4] Neither Levy's work nor this essay should be considered definitive histories of free expression in the colonies. Many records were not made or did not survive the ravages of time and colonial experience.

[5] Horatio Rogers, *Discourse Before the Rhode Island Historical Society* (Providence: Snow and Farnhum, Printers, 1890), p. 10.

[6] John Fiske, *The Beginnings of New England* (Boston: Houghton, Mifflin and Company, 1896), p. 127.

[7] Charles Edward Perry, *Founders and Leaders of Connecticut, 1633-1783* (Boston: D.C. Heath and Company, 1934), p. 11.

[8] Herbert L. Osgood, *The American Colonies in the Seventeenth Century* (New York: The Macmillan Company, 1904), I, p. 302.

[9] Clinton Lawrence Rossiter, *Seedtime of the Republic: The Origin of American Tradition of Political Liberty*, First Edition (New York: Harcourt and Brace, 1953), p. 165.

[10] J. Mark Jacobson, *The Development of American Political Thought: A Documentary History* (New York: The Century Company, 1932), p. 17.

[11] Alice Mary Baldwin, *The Clergy of Connecticut in Revolutionary Days*, Tercentenary Pamphlet Series No. 56 (New Haven: Yale University Press, 1936), p. 6.

[12] Zechariah Chafee, *Free Speech in the United States* (Cambridge: Harvard University Press, 1941), p. 234.

[13] Irving Berdine Richman, *Rhode Island: Its Making and Its Meaning, 1636-1683* (New York: G.P. Putnam's Sons, 1902), II, p. 46.

[14] David S. Lovejcy, *Rhode Island Politics and the American Revolution*, 1760-1776 (Providence: Brown University Press, 1958), p. 29.

[15] Dan King, *The Life and Times of Thomas Wilson Door* (Boston, 1859), p. 15.

[16] Samuel Green Arnold, *History of the State of Rhode Island and Providence Plantations* (Providence: Preston and Rounds, 1899), I, p. 109.

[17] John Callendar, editor, *An Historical Discourse on the Civil and Religious Affairs of the Colony of Rhode Island*, IV of *Collections of the Rhode Island Historical Society* (Boston: Thomas H. Webb and Company, 1843), p. 229.

[18] Arnold, *History of the State of Rhode Island*, I, p. 205.

[19] Edward Field, *State of Rhode Island and Providence Plantations at the End of the Century: A History* (Boston: The Mason Publishing Company, 1902), I, p. 233.

[20] Chafee, *Free Speech in the United States*, p. 5.

[21] Rossiter, *Seedtime*, p. 14.

[22] Osgood, *The American Colonies*, I, p. 302.

[23] Perry, *Founders*, p. 6.

[24] Perry, p. 20; also, Mary Jeanne Anderson Jones, *Congregational Commonwealth: Connecticut, 1636-1662* (Middletown, Conn.: Wesleyan University Press, 1968), p. 98.

[25] No quantitative comparison with Levy's work is attempted, because Levy provides no basis for it. Nevertheless, every instance of restriction dealing clearly with speech found by this author in the colonial records and secondary sources is cited herein.

[26] For a discussion of a historical approach to a study of freedom of speech see John Lee Jellicorse, "Some Historical Essentials of Teaching Freedom of Speech," *Free Speech Yearbook*, III, 1972, pp. 76-84.

[27] Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (New York: Yale University Press, 1943), p. 100.

[28] J. Hammond Trumbull, editor, *The Public Records of the Colony of Connecticut 1636-1776* (Hartford: Brown and Parsons, 1850-1890), I, p. 520.

[29] Clarke, *Parliamentary Privilege*, p. 178.

[30] John Russel Bartlett, editor, *Records of the Colony of Rhode Island and Providence Plantations in New England* (Providence: A. Crawford Greene and Brother, 1856), I, p. 213; affirmed May 19, 1657, I, p. 354.

[31] Arnold, *History of the State of Rhode Island*, I, p. 257.

[32] Charles P. Hoadly, editor, *Public Records of Connecticut*, VII, p. 244.

[33] Bartlett, *Records of Rhode Island*, I, p. 147. A change of procedure was instituted on October 26, 1650, as revealed in Arnold, *History of the State of Rhode Island*, I, p. 232.

[34] Field, *State of Rhode Island*, III, p. 39; Prescott O. Clarke, *Rhode Island and Providence Plantations* (Providence: E.A. Johnson and Co., Printers, 1885), p. 9.

[35] *At the General Assembly of the Governor and Company of the English Colony of Rhode Island, and Providence Plantations, in America, June, 1776 Session Records* (Newport: Printed by Samuel Ward, 1776).

[36] Bartlett, *Records of Rhode Island*, IV (Providence: Knowles, Anthony and Co., 1858), p. 580.

[37] Bartlett, *Records of Rhode Island*, IV, p. 580.

[38] Bartlett, *Records of Rhode Island*, V, p. 75.

[39] Bartlett, *Records of Rhode Island*, V, p. 336.

[40] Bartlett, *Records of Rhode Island*, V, p. 562; additional dissents may be found at pages 190, 400, 401, 438; and Bartlett, *Records of Rhode Island*, VI, pages 19, 80, 102, 133, 148, 406, 436, 464, 495.

[41] Arnold, *History of the State of Rhode Island*, II, p. 263.

[42] Bartlett, *Records of Rhode Island*, VI, pp. 416-427; see also p. 452 for an Assembly order to colonists to ignore the Stamp Act because it was an outside attempt at taxation that was "unconstitutional, and hath a manifest tendency to destroy the liberties of the people of the colony." See also VII, p. 388.

[43] For example, the first dissenters cited -- Ellery and Bours -- were returned by the Islanders to the Assembly at the next election (see *Records of Rhode Island*, V, p. 5) and given high responsibilities by the Assembly (see V, p. 79). These kinds of subsequent events appear in the records for nearly all dissenters, regardless of the chill of their criticism.

[44] Bartlett, *Records of Rhode Island*, I, p. 255. Any freeman could record a protest of a decision by the Assembly or Towne Meeting for a like sum.

[45] Field, *State of Rhode Island*, III, p. 97.

[46] Field, *State of Rhode Island*, III, p. 97.

[47] Jones, *Congregational Commonwealth*, p. 69.

[48] Trumbull, *Public Records of Connecticut*, I, pp. 14-19.

[49] Trumbull, *Public Records of Connecticut*, I, p. 520. Note that the Court and the Assembly were the same body, performing legislative, judicial, and executive tasks.

[50] Levy, p. 63.

[51] Levy, p. 63, p. 43.

[52] Trumbull, *Public Records of Connecticut*, I, pp. 77-78.

[53] Trumbull, *Public Records of Connecticut*, II, p. 392.

[54] Trumbull, *Public Records of Connecticut*, I, p. 51. Note, first, that the precise language of Gydersly is not included in the *Records*, a deficiency repeated often; second, as is the case most of the time when a person is ordered to appear at the next session of Court, no mention of the case is made in any subsequent records.

[53] Hoadly, *Public Records of Connecticut*, V, p. 492. See also the cases of Jeramy Addoms, March 5, 1644, in Trumbull, *Public Records of Connecticut*, I, p. 123; Thomas Ozmore, March 5, 1644, in I, p. 124; John Charles, February 2, 1646, in Hoadly, *Records of the Colony and Plantations of New Haven, 1638-1649* (Hartford: Case, Tiffany and Company, 1857), pp. 298-300; John Scott, March 10, 1663, in Trumbull, *Public Records of Connecticut*, I, p. 417; William Bradley, April 11, 1665, in Franklin Bowditch Dexter, editor, *New Haven Town Records, 1662-1684*, vol. II of *New Haven Colony Historical Society Ancient Town Records Series* (New Haven, 1919), p. 138; Jeremiah Ripley, May 10, 1733, in Hoadly, *Public Records of Connecticut*, VII, p. 428; John Owen, May 12, 1743, VIII, p. 519; Roger Bidwell, May 12, 1743, VIII, p. 548; also IX, p. 255, for Bidwell reversal; Daniel Scot, XI, p. 139. (Note: This is the only case in which the Grand Jury returned an indictment for spoken words. In all other cases the legislature assumed the role of accuser.)

[56] Hoadly, *Public Records of Connecticut*, IX, p. 20.

[57] Hoadly, IX, p. 28.

[58] Hoadly, IX, p. 29.

[59] Clarke, Parliamentary Privilege, p. 107.

[60] Bartlett, Records of Rhode Island, II (Providence, 1857), p. 438.

[61] Arnold, History of the State of Rhode Island, I, p. 355.

[62] Arnold, I, p. 355.

[63] Bartlett, Records of Rhode Island, II, p. 455.

[64] Arnold, History of the State of Rhode Island, I, p. 553.

[65] Arnold, II, p. 5.

[66] Bartlett, Records of Rhode Island, VI (Providence: Knowles, Anthony and Co., 1858), pp. 276-277.

[67] Act of March 1, 1662, in Acts and Laws of His Majesty's Colony of Rhode Island and Providence Plantations in America (Boston in New England: Printed by John Allen, for Nicholas Boone, at the Sign of the Bible in Cornhill, 1719), p. 4; see also 1663 Act in Laws and Acts of Her Majesties Colony of Rhode Island and Providence Plantations Made from the First Settlement in 1636 to 1705 (Providence: Rider and Rider, 1896), p. 1.

[68] Act of February, 1728, in Acts and Laws of His Majesty's Colony of Rhode Island and Providence Plantations in America (Newport: James Franklin, 1730), p. 169.

[69] Field, State of Rhode Island, I, pp. 59-60. Gorton was charged again on October 18, 1660, for "slander of the Court," but the General Attorney of the Colony failed to appear to prosecute, so Gorton was released. See Bartlett, Records of Rhode Island, I, p. 76. See the cases of John Warner, April 24, 1652, in Collections of the Rhode Island Historical Society, II, note on p. 55; Tom Greene, June 30, 1657, in Rhode Island Court Records, 1647-1662 (Providence, 1922), I, p. 29; Samuell Crokke, June, 1658, I, p. 43; Edmund Calverly, October, 1664, in Bartlett, Records of Rhode Island, II, pp. 63-64, 98-99; William Dyre, May 3, 1665, II, pp. 107-109; William Harris, July 2, 1667, II, pp. 209, 237; William Harris, February, 1672, in Field, State of Rhode Island, I, p. 121; Francis Uselton, June 7, 1671, in Bartlett, Records of Rhode Island, II, p. 392; John Saffin, 1678, in Durfee, Gleanings from the Judicial History of Rhode Island, Series No. 1 of Rhode Island Historical Tracts, No. 18 (Providence: Sidney S. Rider, 1883), p. 128; Richard Smith, July 9, 1679, in Bartlett, Records of Rhode Island, III, pp. 49-50; Gabriel Bernon, 1716, IV, p. 215; John Martin, 1753, in Field, State of Rhode Island, III, p. 159; Samuel Thayer, November, 1756, in Bartlett, Records of Rhode Island, V, pp. 552-554; Samuel Thayer, January 10, 1757, VI, pp. 5, 15; John Wheaton, February 1, 1757, VI, p. 20.

[70] Account of October, 1652, letter in Arnold, History of the State of Rhode Island, I, p. 243.

[71] Bartlett, Records of Rhode Island, II, p. 388.

[72] Levy, p. 31.

[73] Levy, p. 49.

[74] Levy, p. 85. It should be noted that it was not until New York Times Co. v. Sullivan 376 U.S. 254, 84 S. Ct. 710 (1964), that the Supreme Court, for all practical purposes, laid to rest any cause of action that a government official (or a government through an official) might have for libel.

[75] Trumbull, *Public Records of Connecticut*, I, p. 14.

[76] Trumbull, I, p. 77-78.

[77] Trumbull, I, p. 515.

[78] Trumbull, I, p. 515. See also p. 537 for a law against lying and cursing and p. 547 for the penalty.

[79] Trumbull, II, p. 392.

[80] Hoadly, *Public Records of Connecticut*, V, pp. 382-383. See also Act of May 12, 1726, VII, p. 8; Act of May 14, 1730, VII, p. 290; Act of May 9, 1734, VII, p. 499.

[81] Dexter, *New Haven Town Records*, pp. 150-151. See also the case of John Jennings, 1649, in Trumbull, *Public Records of Connecticut*, I, p. 203; John Russell, in Jones, *Congregational Commonwealth*, p. 119.

[82] Dexter, p. 210.

[83] Dexter, p. 275.

[84] Dexter, p. 276. See also the cases of Dan Clarke, in Trumbull, *Public Records of Connecticut*, II, p. 416; and Mary Stephens, May 9, 1728, in Hoadly, *Public Records of Connecticut*, VII, p. 176.

[85] Jones, *Congregational Commonwealth*, p. 120.

[86] Jones, p. 120. See also the cases of Robert Bartlett, June 30, 1646, in Trumbull, *Public Records of Connecticut*, I, p. 142; John Bennett, 1640, I, p. 167; Danyell Turner, I, p. 194; William Wooden, December 7, 1647, in Hoadly, *Records of the Colony and Plantation of New Haven*, p. 339; John Morris, January 3, 1670, in Dexter, *New Haven Town Records*, p. 274.

[87] Bartlett, *Records of Rhode Island*, I, p. 184.

[88] *Laws and Acts of Her Majesties Colony of Rhode Island and Providence Plantations Made from the First Settlement in 1636 to 1705* (Providence: Sidney S. Rider and Burnett Rider, 1896), p. 11. For other laws on slander see Act of May 27, 1640, in Bartlett, *Records of Rhode Island*, I, p. 29, 159; Act of October 28 1652, in Arnold, *History of the State of Rhode Island*, I, p. 242; and Irving Berdine Richman, *Rhode Island: Its Making and Its Meaning 1636-1683* (New York: G.P. Putnam's Sons, 1902), II, p. 40 note; Act of May 23, 1650, in Bartlett, *Records of Rhode Island*, I, p. 228; Act of November, 1756, in Bartlett, V (Providence: Knowles, Anthony and Co., 1860), p. 556.

[89] Act of 1665, in Richman, *Rhode Island: Its Making and Its Meaning*, II, p. 39. See also Acts of 1728, in *Acts and Laws of His Majesty's Colony of Rhode Island and Providence Plantations in America* (Newport: Printed by James Franklin, 1730), p. 175, 226; Act of 1748, in Bartlett, *Records of Rhode Island*, V, p. 260; this act also found in *Acts and Laws of His Majesty's Colony of Rhode Island and Providence Plantations in New England in America from Anno 1745, to Anno 1752* (Newport: printed by J. Franklin, 1752), p. 52.

[90] Act of 1647, in Bartlett, *Records of Rhode Island*, I, p. 159; also, in Arnold, *History of the State of Rhode Island and Providence Plantations*, I, p. 208.

[91] Act of 1663, in *Laws and Acts of Her Majesties Colony of Rhode Island and Providence Plantations Made from the First Settlement in 1636 to 1705* (Providence: Rider and Rider, 1896), p. 1; Act of 1728, in *Acts and Laws of His Majesty's Colony of Rhode Island and Providence Plantations* in America (Newport: James Franklin, 1730), p. 170.

[92] Act of 1663, in *Laws and Acts of Her Majesties Colony of Rhode Island and Providence Plantations Made from the First Settlement in 1636 to 1705* (Providence: Rider and Rider, 1896), p. 14; Act of 1736, in *Laws, Made and Pass'd by the General Assembly of His Majesty's Colony of Rhode Island and Providence Plantations 1730-1736*, p. 276.

[93] Act of 1663, in *Laws and Acts of Her Majesties Colony of Rhode Island and Providence Plantations Made from the First Settlement in 1636 to 1705* (Providence: Rider and Rider, 1896), p. 9.

[94] Act of 1729, in *Acts and Laws of His Majesty's Colony of Rhode Island and Providence Plantations in America* (Newport: James Franklin, 1730), p. 185.

[95] For the case of Smith v. Arnold see *Rhode Island Court Records, 1662-1670* (Providence, 1922), II, p. 6; for the case of George Gardener, Jr., see *Rhode Island Court Records*, II, p. 7; for Briggs v. Arnold, see *Rhode Island Court Records*, II, p. 22; for a grant of a change of venue in the case of Steven Hopkins v. Sam Ward, June 13, 1757, see Bartlett, *Records of Rhode Island*, VI, pp. 68-69; for the case of Daniel Coggeshall see Bartlett, IV, p. 21.

[96] Levy, p. 140.

[97] Elisha Williams, *A Seasonable Plea for the Liberty of Conscience, and the Right of private judgment in Matters of Religion, without any controul from human Authority, By a Lover of Truth and Liberty*, signed, Philalethes (Boston, 1744), p. 6, 40.

[98] Levy, p. 140.

[99] Trumbull, *Public Records of Connecticut*, I, p. 361.

[100] Charles M. Andrews, *The Beginnings of Connecticut, 1632-1662*, Tercentenary Pamphlet Series No. 32 (New Haven: Yale University Press, 1934), p. 55.

[101] Andrews, p. 55.

[102] Trumbull, *Public Records of Connecticut*, I, p. 361. For the case of the Reverend Samuel Stone, acquitted on charges of violating basic law, March, 1654/1655, see Hoadly, *Records of the Particular Court in Connecticut, 1639-1663*, XXII of *Collections of the Connecticut Historical Society* (Hartford, 1928), p. 140.

[103] Andrews, *The Beginnings of Connecticut*, p. 55.

[104] Trumbull, *Public Records of Connecticut*, I, p. 524.

[105] Irving Brant, *The Bill of Rights: Its Origin and Meaning* (New York: The New American Library, 1965), p. 97.

[106] Brant, p. 97.

[107] Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (New York: Burt Franklin - originally published in London, 1883), p. 303.

[108] Brant, *The Bill of Rights*, p. 127.

[109] Stephen, *A History of the Criminal Law*, p. 314.

[110] Stephen, p. 315.

[111] Brant, *The Bill of Rights*, pp. 113-115.

[112] Stephen, *A History of the Criminal Law*, p. 313.

[113] Levy, p. 22.

[114] Levy, p. 32.

[115] Levy, p. 23.

[116] Levy, p. 23.

[117] Osgood, *The American Colonies in the Eighteenth Century* (New York: Columbia University Press, 1924), III, p. 275.

[118] Jones, *Congregational Commonwealth*, p. 134.

[119] Trumbull, *Public Records of Connecticut*, I, p. 129.

[120] Albert C. Bates, editor, *The Law Papers: Correspondence and Documents During Jonathan Law's Governorship of the Colony of Connecticut, 1741-1750*, vols. XI, XIII, XV of *Collections of the Connecticut Historical Society* (Hartford, 1907), II (XIII of *Collections*), p. 96.

[121] Bates, editor, *The Fitch Papers: Correspondence and Documents During Thomas Fitch's Governorship of the Colony of Connecticut, 1754-1766*, vols. XV, XVIII of *Collections of the Connecticut Historical Society* (Hartford, 1918), II (XVIII of *Collections*), p. 199.

[122] Jones, *Congregational Commonwealth*, p. 133.

[123] *Rhode Island Court Records, 1647-1662*, I, p. 29. See also Bartlett, *Records of Rhode Island*, II, p. 208, 237; Bartlett, IV, p. 22; for comparisons with other monetary figures see Bartlett, II, p. 167; for *per diem* allowances see Arnold, *History of the State of Rhode Island*, I, pp. 354-356; for pay structures, Lovejoy, *Rhode Island Politics and the American Revolution*, p. 16, for voting qualifications. Lovejoy goes on to say, "At first glance these figures seem high, but money was cheap in Rhode Island owing to frequent emission of paper bills of credit."

[124] See the John Warner case in Arnold, *History of the State of Rhode Island*, p. 287; also, the case of Edmund Calverly, in Bartlett, *Records of Rhode Island*, II, p. 63.

[125] Levy, p. 34. Levy's work should not go unquestioned. He may have generalized hastily. For his point that "No cause was more honored by rhetorical declamation and dishonored in practice than that of freedom of expression during the revolutionary period, from the 1760's through the cessation of hostilities..." (p. 63) he cites one example of a Tory deprived of his right of free speech. But there are contrary examples of passion controlled. On January 12, 1776, in Cedar Point, Maryland, a seventy-year-old Tory named Mr. Lee "had called patriots 'rabble. Fifteen hundred of them came out to give him a lesson in politics. They dragged him to a clearing and gave him a loyalty oath to sign. He refused: 'You may kill me but you shall not force me to retract one syllable. If the blind rage that contends for liberty can force me to go against my conscience, it is time to take an eternal farewell.' Lee told the vigilantes they could not force their brand of liberty on him. 'I have lived a free man and it is my resolution to die one.' No one tried to stop the old Tory as he walked away." (From the script of the C.B.S. Bicentennial Minute of January 12, 1976.) Grateful acknowledgement goes to C.B.S. and Robert Markell, Executive Producer of the Bicentennial Minutes, for allowing me to use the information above.

[126] The art of the historian is "imaginative synthesis and re-creation from among the myriad fragments that are the residue of the past." Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), p. 9. For essays on rhetorical history see Joe Munshaw, "The Structures of History: Dividing Phenomena for Rhetorical Understanding," *Central States Speech Journal*, 24 (1973), 29-42; and Bruce Grombeck, "Rhetorical History and Rhetorical Criticism: A Distinction," *Speech Teacher*, 24 (1975), 309-320.

[127] Quarterly Journal of Speech, 58 (1972), pp. 396-407.

[128] Bormann, p. 398.

[129] Bormann, p. 399.

[130] Bormann, p. 406.

[131] Thomas I. Emerson, "Toward a General Theory of the First Amendment," Yale Law Journal, 72 (1963), p. 893.

[132] Emerson, pp. 893-895.

[133] Emerson, p. 895.

[134] Clinton L. Rossiter, The First American Revolution: The American Colonies on the Eve of Independence (New York: Harcourt, Brace and World, Inc., 1956), p. 101.

[135] Rossiter, The First American Revolution, p. 102.

[136] Rossiter, The First American Revolution, p. 103.

[137] Irving Brant, "Seditious Libel: Myth and Reality," New York Law Review, 39 (1964), p. 1.

[138] Leon Whipple, The Story of Civil Liberties in the United States (New York: Vanguard Press, American Civil Liberties Union, 1927), p. 19.

[139] Rossiter, Seedtime, p. 164.

[140] Rossiter, Seedtime, p. 164.

[141] Rossiter, Seedtime, p. 168.

[142] The text can be found in Trumbull, Public Records of Connecticut, I, pp. 20-25.

[143] See Jones, Congregational Commonwealth, pp. xi-xii; also, Fiske, The Beginnings of New England, p. 127.

[144] Rossiter, Seedtime, p. 189.

[145] Rossiter, Seedtime, p. 189.

[146] Rossiter, Seedtime, p. 190.

[147] Rossiter, Seedtime, p. 191.

[148] Rossiter, Seedtime, p. 192. See also Rossiter, The First American Revolution, pp. 76, 77, and 92 for the relationship of religious freedom to political freedom.

[149] Stephen, A History of Criminal Law, II, pp. 299-300. This quotation is a summary of themes actually used in England and probably transported to the colonies.

[150] Brant, The Bill of Rights, p. 235; also, James Madison, Report on the Virginia Resolutions, as quoted in Chafee, Free Speech in the United States, pp. 18-21.

[151] Rossiter, The First American Revolution, p. 104.

[152] Jones, Congregational Commonwealth, p. 167.

[153] Jones, p. 167; Arnold, History of Rhode Island, 2 vols. The point of Levy's thesis is that the popularly elected representatives of the colonists sup-

pressed free expression. Since the councils and assemblies were elected in Connecticut and Rhode Island, cases of restriction of speech by both bodies were included in this work.

[154] Epaphroditus Peck, *The Loyalists of Connecticut*, Tercentenary Pamphlet Series, No. 31 (New Haven: Yale University Press, 1934), p. 17. Only two cases were discovered where a colonist was challenged for remarks made about the king: the cases of John Scott, March 10, 1663, in Trumbull, *Public Records of Connecticut*, I, p. 417; and Matt Graves, January 3, 1750/1751, in Bates, *The Wolcott Papers: Correspondence During Roger Wolcott's Governorship of the Colony of Connecticut, 1750-1754*, XVI of *Collections of the Connecticut Historical Society* (Hartford, 1916), p. 5.

[155] Perry, *Founders*, p. 52.

[156] Rossiter, *Seedtime*, p. 160. See Rossiter's chapter on Hooker, pp. 159-178.

[157] Quoted in Perry, *Founders*, p. 53.

[158] Perry, *Founders*, p. 53.

[159] Fiske, *The Beginnings of New England*, p. 117.

[160] Rossiter, *Seedtime*, p. 179. See Rossiter's chapter on Williams at pp. 179-204.

[161] Rossiter, *Seedtime*, p. 194.

[162] Fiske, *The Beginnings of New England*, p. 268.

[163] Fiske, p. 185.

[164] Fiske, p. 184, 186.

[165] Fiske, p. 195.

CONTRIBUTIONS OF SIXTEENTH-CENTURY ANABAPTIST HERETICS TO FIRST-AMENDMENT FREEDOMS

Jess Yoder
Cleveland State University

"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof..."

Freedom of speech is discussed today more than the other First Admendment freedoms established in the Bill of Rights. This was not the case in the days of the chartered colonies, nor was it so in most of the western world during the millennium prior to the gaining of American independence. Throughout that period freedom of religion was the one most tested and controversial. Although freedom of religion and freedom of speech have always been interrelated and often inseparable, historically freedom of religion has been the forerunner of freedom of speech.

One can go back to the formulation of democratic concepts in Greek society and witness man's challenging the authority of the gods. The case against Socrates was for religious heresy because he questioned the religious beliefs of Athenians. Later Christians came into conflict with the state religion of the Roman world. During the medieval period heretical Turks were driven out by Christian emperors. Roman Catholic and Protestant princes of the Reformation era outlawed the Anabaptists. These conflicts arose because people holding religious beliefs that differed from the civil religion were denied the right to express their views. Later revolutions in France, America, Russia, and elsewhere centered mainly on conflicting ideological views regarding economic matters. But, whether the confrontation focused on religious, economic, or social problems, the issue common to all these diverse conflicts concerned the relationship between the authority and power of government on one hand and the rights and freedoms of the people on the other. Cicero said, "Freedom dwells in no state where the people do not possess supreme authority; nothing is to be more prized than freedom, but when it is not the same for all, then it is not freedom."[1]

In contemporary experience freedom issues have centered in the struggles of minorities denied rights accorded to majorities. These perspectives on freedom found their way into our present belief and value system because in preceeding centuries marginal religious groups and heretics articulated, debated, suffered and died for freedoms denied them. Those demands for religious freedom usually raised the broader question of human rights and freedoms. This study concerns the impact of a unique group known as the Anabaptists,[2] who demanded religious freedom in the sixteenth century.

Contemporary Reassessment of Anabaptist Thought

For centuries the religious history of sixteenth-century Anabaptists had been written by their adversaries. Recently scholars have rediscovered the writings of several Anabaptists. Consequently their place in history is being reassessed.[3] Speaking of the Anabaptists, Frederic Palmer has written: "They proclaimed universal toleration in days when toleration was regarded as a sin and a crime. They proclaimed freedom of conscience, freedom in teaching, organization, and worship. They were, in short, the modern men of their time."[4]

Ernest Payne claimed that they were the first to "put forward the then and new revolutionary principle of religious toleration."[5] Church historian Walter Köhler called them the Bähnbrecher (pioneers) of the modern world view with its freedom of conscience and faith."[6] Rufus M. Jones asserted that the Anabaptists were the first to advocate the "absolutely free and independent religious society" and state as realized in modern England and America.[7]

Franklin Littell said that it was the Anabaptists and the radical Puritans who contributed a "substantial portion of those understandings of religious liberty, voluntary association, separation of religious convenant from political contract, stubborn attention to the reserved rights of subjects or citizens, and due process of law which are of the highest qualities in the American experiment of self-government."[8]

Speaking of the Anabaptists, Roland Bainton said that they "anticipated all other religious bodies in the proclamation and exemplification of three principles which are on the North American continent among those truths which we hold to be self-evident: the voluntary church, the separation of church and state, and religious liberty."[9] Bainton said that though these cardinal principles came to us by way of the Puritans and the French Revolution, they were first set forth by the Anabaptists.

The Denial of Religious Freedom for Anabaptists

With the conversion of Constantine the principle *cuius regio, eius religio*, was established. It was reaffirmed by the Peace of Augsburg in 1555 and continued through the Reformation. For example, in the Palatinate during the sixteenth century organized religion changed from Catholic to Lutheran, to Reformed, back to Lutheran, and then to Catholic simply because the religion of the rulers changed. In that state-church system (*volkskirche*) heretics were to be punished. With the backing of powerful German princes Martin Luther was able to confront the authority of Rome. But Luther's successful revolt did not change the system; it changed only the religion of the state. The same was true for those states which adopted the Reformed teachings of Zwingli and Calvin. Protestantism did not usher in religious freedom, though some have claimed that it did.[10] In fact, as William Warren Sweet pointed out, the opposite effect resulted. He said, "The rise of Protestantism was accompanied by an unprecedented outburst of intolerance and cruelty in which Protestants and Catholics participated."[11]

The Anabaptist movement emerged within the political systems of Holland, Switzerland, and Germany. Later it spread to England, America, and eastern Europe. The invention of the printing press and translating the Bible into the vernacular played major roles in the rise of the Anabaptist movement. In 1522 Luther's newly translated Bible was printed, and the first five thousand copies were sold out in two months.[12] Schaff comments on the impact of printing the Bible in these words:

> The precious little volume, which contains the wisdom of the world, made its way with lightening speed into the palaces of the princes, the castles of the knights, the convents of the monks, the studies of the priests, the houses of citizens, the huts of peasants. Mechanics, peasants, and women carried the New Testament in their pockets, and dared to dispute with priests and doctors of theology about the gospel.[13]

The Anabaptists were among those who read the Bible and dared to dispute with religious authorities. They challenged the *Corpus Christanum* position by insisting that becoming a Christian was a matter of persuasion and conversion. So they contested infant baptism. They practiced baptism based on a person's voluntary confession of faith. The Anabaptists believe that the Church is constituted as a voluntary fellowship of believers. Consequently, they violated state laws that required infant baptism and did not permit rebaptism.

Spreading the "free church" doctrines of the Anabaptists was soon outlawed. Likewise, assemblies of persons holding such beliefs were banned. By enforcing severe penalties and denying public discussion and debate the rulers unsuccessfully tried to force the guilty to recant and confess the creed of the state church.[14] The Anabaptist movement was forced to go underground. Its supporters conducted secret church meetings in forests, behind locked doors, and in a variety of ingenious hide-a-ways. The growing membership included priests, scholars, mayors, farmers, tradesmen, and professionals. In January, 1528, Johann Cochlaeus reported to Erasmus that the Anabaptists numbered 18,000. The rapid expansion of the sect was of great concern to the Archbishop of Mainz. He advised that a book be written against the Anabaptists.[15]

The spreading Anabaptist heresy was met with firm resistance. On January 4, 1528, Charles V, the Holy Roman Emperor, decreed that "each and every Anabaptist and rebaptized person, man or woman, of accountable age, shall be brought from natural life to death with fire, sword, and the like."[16] The imperial mandate was supported by German princes who met at the Diet of Speyer in 1529. The princes "legitimized" the punishments of Anabaptists by giving courts and officials legal statutes to follow. Although the Protestant and Catholic princes gathered at Speyer were unable to settle differences between themselves, they agreed to support one another in the search for and punishment of Anabaptist heretics. In the two-year period following the decree they filled their prisons with Anabaptists. There are numerous accounts of property confiscated and brutal torture such as branding with hot irons, cutting off fingers and then exiling, cutting out the tongue, stretching victims on the rack, applying screws, and hundreds of accounts of death by drowning, burning, and the executioner's axe. The Martyrs' Mirror lists by name about eight hundred persons executed. The Hutterite Chronicles set the total number of deaths up to 1581 at 2,169.[17] The Burgrave of Alzey, where the treatment of the Anabaptists was extremely harsh, is said to have cried out one day; "What shall I do? The more I judge and have executed, the more there are."[18]

Anabaptist Appeals for Religious Freedom

It is logical that the call for religious freedom would not come from those holding the Corpus Christanum view; rather one would expect the call for religious toleration and liberty to come from people being denied the right to worship as they believed. The exigency called for a response from the Anabaptists. But they had an even more basic reason than the logical response to intolerance; they believed that the true church is made up of believers who have voluntarily accepted the doctrines of Christian faith. Christianity, as they understood it, calls for freedom of choice. They believed that people should have the right to reject as well as accept religious teachings. Hans Denk, an influential Anabaptist, taught that personal freedom is the fundamental fact of man's nature.[19]

Because the Anabaptists were heretics and outlaws scattered throughout Switzerland, Holland, Germany, Moravia, and other parts of Europe, they did not present a unified response on religious issues, particularly on such matters as freedom of religion and freedom of speech. Their views on these freedom issues are evident from their confessions, writings, songs, letters, and statements at trials or execution sites. In many instances the following sampling of their views on religious freedom is strikingly similar to the views of James Madison and Thomas Jefferson.[20] The Anabaptists contended that the domains of the church and the secular kingdom (state) were separate.

According to the court records of Zurich, Felix Manz, the first Anabaptist martyr, taught that those people of other faiths are to be left undisturbed in their practices.[21] Citing the example of the reasoned debate between the apostles Peter and Paul, the Anabaptists insisted that there must be freedom of discussion and debate for truth (i.e., God's will) to emerge. They also rested their case for religious freedom upon the biblical accounts of the early Church. Apostles preached; in turn some people responded in belief and and then were baptized, and others were free to reject the teachings of the apostles.

Balthasar Hubmaier, a powerful leader who was later burned at the stake in Vienna, challenged the right of the state or any institution to classify himself or any other person as a heretic. The Scriptures do not give such authority. He, too, wrote in a tract, "Now let this saying be evident to everyone, even to the blind: the heretic is an invention of the devil."[22] Condemning the heretic burners, Hubmaier further declared that neither a Turk nor a heretic can be persuaded with the sword or with fire.

Hans Denk, an Anabaptist from Basel, described the godly state as one in which "every man will permit every other man, be he Turk or heathen believing what he will, to travel and dwell through and in his land.... No one will take vengeance on another, whether Turk, heathen, or Christian, but permit him to dwell and move in every land in the name of God."[23]

Killian Aurbacher, of Moravia, in 1534 wrote: "It is never right to compel one in matters of faith, whatever he may believe, be he Jew or Turk... Christ's people are a free, unforced and uncompelled people ..."[24]

Menno Simons, an influential Anabaptist leader in Holland, lamented that the magistrates "are taught by their theologians that they should arrest, imprison, torture, and slay those who are not obedient to their doctrine, as may, alas, be seen in many cities and countries."[25]

The Anabaptists rebuked the Reformed church leaders in the Palatinate for using the sword as a means of influencing opinions and decisions.[26] They said that the only punishment available to the Church was excommunication. In an appeal to the Zurich city council the Anabaptists said that "state authorites have no place in the church of God, no right to control and persecute the conscience."[27] Article IV of the widely used Sleitheim Confession (1527) speaks of the separate domains of church and state (Kingdom of the World and Kingdom of God).[28]

Michael Bullinger of Zurich, a powerful opponent of the Anabaptists, made the following statements explicating their beliefs: "One cannot and should not use force to compel anyone to faith, for faith is a free gift of God." "It is wrong to compel anyone by force or coercion to embrace the faith, or to put to death anyone for the sake of his erring faith." "The secular kingdom should be separated from the church and no secular ruler should exercise authority in the church."[29]

Thus it can be seen that Anabaptists repeatedly called for religious freedom and that their position was understood by their adversaries.

Anabaptist Views on Freedom of Speech

The foregoing quotations, which call for freedom of religion, also imply the right of people to have freedom of speech and freedom of assembly. Below are a few instances of appeals to freedom of speech.

Leonhard Schoener, who was beheaded in 1528 at Rothenburg, speaking of his adversaries, said, "They made the world too small for us" in his complaint of being denied the right to present his case.[30]

When Hans van Overdam was led to the scaffold, he told the procurator general, "My lords, if we could have disputed publicly, it would soon have been seen what kind, learned men they [his opponents] were."[31]

John Claess complained that he had not even been granted the rights of a criminal, whose case is heard by a full court of seven judges.[32]

The same charge was made by Lauwerens van de Walle, who said, "Thieves and murderers are allowed to have someone who speaks for them; but you have brought it about that neither a procurator nor an advocate may speak for us; hence we must speak for ourselves."[33] He was publicly burned at Ypres in Flanders.

In 1549 a woman named Elizabeth was apprehended and cross-examined. Upon her refusal to recant the procurator general applied thumbscrews and shinscrews to obtain information about her fellow believers. She refused to give that information and was condemned to be drowned in a bag.[34]

The *Hutterite Chronicles* are filled with hundreds of such accounts compiled from letters and notes passed among the families and Anabaptist congregations that continued to meet in secret.

Adversaries of Anabaptists contended that freedom of speech did not apply to religious issues because matters of doctrine were not debatable. Thus, they argued, a criminal could be accorded freedoms of trial denied to heretics. The denial of due process, however, did not stop the Anabaptist movement. On many occasions they spoke as free persons even though freedom was denied them. The public became informed and was influenced in a variety of ways. Sympathetic guards slipped messages to outside friends. Condemned heretics used delaying tactics so that they could speak at execution sites. Poems and hymns telling their story flourished.[35] Watching fellow believers burn at the stake or kneel before the executioner's block strengthened the faith of believers. Ample references indicate that the consciences of their accusers were troubled for denying freedom of speech and religion by such severe penalties.[36]

The Immediate Impact of the Anabaptists on Freedom of Speech and Religion in Europe

In the preface to the Frankenthal Disputation of 1571 the Elector of the Palatinate wrote that he had received complaints that the Anabaptists were not adequately heard. He therefore summoned the Anabaptists to a public disputation with his theologians. Earlier disputations, which were documents of the court, were often used as evidence against the Anabaptists, but in the latter part of the century the rulers promised that such reprisals would not be made.[37] Apparently the pressure for more freedom was so strong that official responses by the rulers were necessary. Because some rulers were more tolerant than others, there was a flow of Anabaptist refugees moving from one state to another in their search for religious freedom. For short periods they found refuge in England, Lichtenstein, Moravia, and Danzig.

The following quotation from Nicholas Zurkinden, a leading member of the Bern city council and a good friend of John Calvin, illustrates Kenneth Burke's claim that an act can be a strong statement. Seventeen years after he witnessed an execution he wrote to Calvin:

> I freely confess that I am also one of those who desire to see the sword used as seldom as possible as a means of compulsion upon the opponents of the faith: and I am moved not so much by the Scripture passages which are cited, to keep the edge of the sword away from the treatment of matters of faith, as the unbelievable examples which have occurred in our time in the punishment of the Anabaptists. I was a witness here when an eighty-year-old grandmother and her daughter, a mother of six children, were led to death for no other reason than that they rejected infant baptism in accord with the well-known and common teaching of the Anabaptists. This one example out of many may suffice. It has deeply shaken me, and I fear the authorities may not remain within the limits which you assign to them, namely that only the worst destroyers of faith and religion are to be punished with death.[38]

Later he wrote again to Calvin: "I know magistrates who regret to have participated in death sentences and who would rather have a hundred enemies than to have the death of a single human being on their consciences."[39] The execution of more than two thousand Anabaptist men and women who were committed to nonviolence was in itself the most forceful argument for freedom of religion and freedom of speech. Many executions were conducted in public. This made public opinion a significant consideration.

The Move Toward Toleration in Europe

Ironically the move toward religious toleration came not from the churches but from the rulers exhausted by religious wars and determined to find basis for peace. In the conclusion to his compilation of the testimonies of the sixteenth-century Anabaptist martyrs Thielman J. van Braght in 1660 editorialized:

> If any one thinks that it does not behoove a king or a prince to tolerate all sorts of doctrines, persuasions, or heretics in his country, but that he may practice such a religion in it, as he understands to be needful for the salvation of his subjects, and to prohibit all others; such a one must also consider this, that if in any country several princes, differing in religion, should come to rule one after another, and each one, seeking to enforce his faith, pollute the land with the blood of its inhabitants, such a country would be nothing else than a hell, or a pool full of disquietude and oppression, where the minds of men would be in such lamentable misery, as ships, which on the dreary and turbulent ocean are rocked hither and thither in the storm by all sorts of winds, till they at last suddenly perish.[40]

Braght's views express the attitudes of many civil rulers in the seventeenth century. Indeed they are strikingly similar to the statements of John Locke and Thomas Jefferson.

The last execution in the Netherlands was in 1574; the last in Belgium in 1597; and the last in Switzerland in 1614. Removal of the death penalty was the first major step toward toleration. Fines and pubishments varied from city to city and country to country.[41] William of Orange was the first to grant complete toleration. When toleration came to Holland, official letters were sent to the magistrates in Switzerland, requesting that they also grant toleration to Anabaptists. The free cities of Holland also became a haven for many English dissenters--Puritans, Seekers, Quakers, and Anabaptists.

By 1660 toleration was granted through most of Europe. However, toleration was still far from freedom. Toleration carried with it discrimination and second-class citizenship. In many states and cities Anabaptists did not have citizenship rights. In most countries they were not permitted to proselytize.[42]

During the seventeenth century many Aabaptists found their way to America, especially to Pennsylvania, which granted religious freedom. The promise of new life in the New World appealed to those who had gained toleration but were still denied freedom. The appeal of the New World to religious dissenters likely helped to soften the hearts of rulers whose subjects were no longer constrained by the consortium of European princes.

Anabaptist Contributions to Freedom of Speech and Freedom of Religion in America

The influence of the Anabaptists upon American freedoms, though indirect, is nonetheless significant. Rufus Jones, in a lecture at Harvard University, said: "Those very ideas and ideals that were howled down in the sixteenth century with the battle cries of world hate... came to life again in the seventeenth century and became triumphant in the latter part of the eighteenth century, when nearly every one of the constructive principles of the Anabaptists got written into the Constitution of the United States, or got expressed in some important branch of American Christianity."[43]

As mentioned earlier, the ideas of a free church, voluntary membership, and a free society had often been voiced by Anabaptists in the century before America was settled. Cardinal points in their creed upset the whole structure of medieval society. Voluntary church membership and religious liberty are antithetical to state-church societal and political structures. Scholars such as Bainton, Jones, Payne, and Trevelyan have documented the impact of Anabaptists on the beginnings of the Quaker, English Baptist, Seeker, and Congregational movements. The leaders of these movements had numerous direct contacts with Anabaptists, particularly in the free cities of Holland. Thomas Hewys and John Smith, Separatist exiles in Holland, were strongly influenced by Dutch Anabaptists. In fact, Smith proposed that they become a branch of the Anabaptist faith. When that proposal was rejected, the first Baptist church was formed in England. Baptist leaders, particularly John Robinson, advised the Massachusetts Puritans to adopt an independent congregational-church system.[44]

After the Revolutionary War the Founding Fathers met to draw up a Constitution for the United States. The colonies had already experienced bitter power struggles between religious leaders and groups. However, the experiments of Rhode Island and Pennsylvania in religious freedom had also been successfully tried. Pfeffer says, "The Baptists were the most active of all the Colonial religious bodies in their unceasing struggle for religious freedom and separation."[45] John Locke's social-contract theory had been so widely accepted that his contentions about the church and the state were regarded as self-evident truths by signers of the Declaration of Independence.

Locke defined a church as a "voluntary society of men, joining themselves together of their own accord in order to engage in the public worship of God, in such a manner as they judge acceptable to Him, and effectual to the salvation of their souls."[46] He defined the state or commonwealth as "a society of men constituted only for the procuring, preserving, and advancing their own civil interests."[47] In his Letter Concerning Toleration Locke said that the care of souls is not committed to the civil magistrate because religion is an "inward persuasion of the mind."

Statements by the Founding Fathers on church-state relationships expressed the separation theme. Jefferson said, "The care of every man's soul belongs to himself."[48] He said that our rulers had no authority over matters of conscience. "Is uniformity attainable?" he asked. His answer: "Millions of innocent men, women and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity. What has been the effect of coercion? To make one half of the world fools, and the other half hypocrites. To support roguery and error all over the earth."[49] James Madison wrote: " The religion, then, of every man, must be left to the conviction and conscience of every man . . . . We maintain, therefore, that in matters of religion no man's right is abridged by the institution of civil society; and that religion is wholly exempt from its cognizance."[58]

Many problems associated with maintaining the principles of religious freedom remain in contemporary society. Should prayer be offered in public schools or in governmental organizations? Should state money be used to subsidize "secular" programs of religious organizations? Should conscientious objectors be subject to the draft?

History has shown us the importance of freedom of religion and of speech. It has also shown us the folly of denying these freedoms to individuals in societies where the church and state have been joined. Approximately two thousand Anabaptists were executed and many more suffered severe and harsh punishments because religious freedom was denied them, but their views on freedom of religion and freedom of speech eventually came to fruition. They were written into the First Amendment of the Constitution of the United States.

FOOTNOTES

[1] Man's Right to Knowledge (New York: Columbia University Press, 1954), p. 47.

[2] They called themselves Baptists or Brethren, not re-Baptists. Bainton

says that the offensive name was fastened upon them in order to bring them under the penalty of the Justinian Code against the Donatists.

[3] Harold S. Bender, "The Anabaptists and Religious Liberty in the 16th Century," *Archiv für Reformationsgeschichte*, Heft 1 (1953), P. 34.

[4] Frederick Palmer, *Heretics, Saints, and Martyrs* (Cambridge: Harvard University Press), p. 61.

[5] Ernest Payne, *The Anabaptists of the Sixteenth Century* (London: Carney Kinsgate Press, 1949), pp. 5ff.

[6] Bender, p. 35.

[7] Rufus M. Jones, *Studies in Mystical Religion* (London, 1909), p. 369.

[8] Franklin H. Littell, *From State Church to Pluralism* (New York: Doubleday & Co., 1962), p. xix.

[9] Roland H. Bainton, "The Anabaptist Contribution to History," in *The Recovery of the Anabaptist Vision*, ed. Guy F. Hershberger (Scottdale: Herald Press, 1957), p. 317.

[10] For example Vernon Louis Parrington says that Luther's teaching on justification by faith moved directly to political liberty. See *Main Currents of American Thought*, I (New York: Harcourt, Brace & Co., 1927), p. 11.

[11] Leo Pfeffer, *Church, State and Freedom* (Boston: Beacon Press, 1953), p. 20.

[12] Philip Schaff, *History of the Christian Church, VI* (New York: Charles Scribner's Sons, 1908), p. 561.

[13] Schaff, pp. 561-562.

[14] Several debates did take place between the Anabaptists and the Reformed But when the Anabaptists refused to admit that they were in error they were imprisoned. Their statements in the debates were used to prove their heresy.

[15] G. Bossert, ed., *Quellen zur Geschichte der Täufer*, I (Leipzig: M. Heinsius Nachfolger Eger & Seivers, 1930), pp. 116-117.

[16] J. Loserth and N. Van der Zijpp, "Charles V," *Mennonite Encyclopedia*, I (Scottdale: Mennonite Publishing House, 1955), p. 549.

[17] *Die Geschichts-Bücher der Weidertäufer in Osterreich-Ungarn* (Vienna, 1883), pp. 278ff. The documents were compiled and arranged by Josef von Beck from hand-written chronicles of Hutterites. Hereafter referred to as *Geschichts-Bücher*.

[18] *Geschichts-Bücher*, p. 31.

[19] Rufus M. Jones, *Spiritual Reformers in the 16th and 17th Centuries* (Boston: Beacon Press, 1914), p. 22.

[20] Though Madison and Jefferson are not quoted extensively in this paper, the two quotations illustrate a point repeatedly made in their discussions of the Bill of Rights.

[21] Bender, *Conrad Grebel* (Goshen: Mennonite Historical Society, 1950), p. 159.

[22] Bender, "The Anabaptists and Religious Liberty," p. 39.

[23] Wilhelm Wiswedel, Bilder und Führergestalten aus dem Taüfertum; ein Beitrag zur Reformationsgeschichte des 16. Jahrhundrets (Kassel: J.C. Oncken, 1928), p. 151.

[24] Bender, "The Anabaptists and Religious Liberty," p. 40.

[25] The Complete Works of Menno Simons, II (Elkhart: John F. Funk, 1871), P. 104.

[26] Protocoll. Das ist/Alle handlund des gesprechs zu Frankenthal in der Churfürstlichen Pfaltz/ mit denen so man Widertäuffer nennet (Heidelberg: Johannes Mayer, 1571), p. 8.

[27] Bender, "The Anabaptists and Religious Liberty," p. 41.

[28] John C. Wenger, "The Schleitheim Confession of Faith," The Mennonite Quarterly Review, 19 (Oct., 1945), pp. 243-253.

[29] John Horsch, Mennonites in Europe (Scottdale: Herald Press, 1942), p. 325.

[30] Thieleman J. van Braght, The Martyrs' Mirror, 5th ed. (Scottdale: Herald Press, 1950), pp. 424-425.

[31] Braght, pp. 486-493.

[32] Braght, pp. 468-471.

[33] Braght, pp. 652-654.

[34] Braght, pp. 546-547.

[35] Several hymns based on the spiritual pilgrimages of the Anabaptists are used today in Amish hymn book Ausbund.

[36] Reports of this kind are found in the Hutterite Chronicles. The letter from Zurkinden to Calvin, cited below, illustrates this point.

[37] See John Howard Yoder, "The Turning Point of the Zwinglian Reformation," The Mennonite Quarterly Review, 32 (April, 1958), pp. 128-140.

[38] Bender, "The Anabaptists and Religious Liberty," p. 47.

[39] Bender, "The Anabaptists and Religious Liberty," pp. 47-48.

[40] Braght, p. 1099.

[41] Braght, pp. 1102, 1106.

[42] In Holland their churches were to appear as houses. They were permitted to worship but not evangelize.

[43] Jones, Mysticism and Democracy in the English Commonwealth (New York: Octagon Books, Inc., 1965), p. 33.

[44] Jones, Mysticism and Democracy, pp. 52-54.

[45] Pfeffer, p. 89.

[46] Pfeffer, p. 90.

[47] Pfeffer pp. 90-91

[48] Pfeffer, p. 94.

[49] Pfeffer, p. 93.

[50] Joseph L. Blau, Cornerstones of Religious Freedom in America (Boston: Beacon Press, 1949), pp. 84-85.

PARLIAMENTARY CONFIDENTIALITY AND FREE SPEECH: A LEGAL VIEW

David L. Jamison
University of Akron

Most legal scholars agree that the constitutional guarantee of free speech, while broad, is not absolute. The exercise of one's freedom of speech may be limited by place, by circumstance, or by the condition of hearers. The range and intensity of political activism in the last two decades have tested those limits.

The dimensions of the right to free speech within a parliamentary body are worth study. Understanding how the clash of parliamentary rights and privileges may be resolved may help clarify other areas of dispute over free speech. It is my purpose to analyze the current state of the right of a parliamentary member to free speech when weighed against the right of the body to retain confidential information. The conclusion of the article will be clearer if the two asserted rights are considered separately, prior cases of a clash between them considered, and then implications derived from the precedents.

I. The "Right" to Retain Confidential Information

It will be informative to consider what privileges of confidentiality are generally recognized. Legislatures, of course, are parliamentary bodies with powers to gather information, propose and debate courses of action, pass bills, and control their own proceedings. The collective efforts of members to inform themselves and to keep records of proceedings result in a great deal of information coming into the ownership and control of the parliamentary body. The substantive materials which form the papers of a legislature become its corporate possessions, objects of a proprietary right which not even an individual member lightly violates. It has been held that only the body, by formal action, can permit release of parliamentary data.[1] In the United States Congress, for example, no "paper belonging to the files of the House" may be surrendered, even to a court of law, and in obedience to a subpoena duces tecum, "without permission of the House first obtained."[2] As well as the right to control their own papers legislatures have a well-recognized right to control their own proceedings and devise rules for their own governance.[3] Both corporate privileges may at times limit the behavior of individual members. Control of documents, for example, means that a member may not withdraw papers from House files for his own use without permission.

Today the U.S. Congress operates largely through its committee structure. The Supreme Court has recognized that "the power of inquiry . . . is an essential and appropriate auxiliary to the legislative function."[4] Further, the Court accords a high place to that power of inquiry. As Mr. Justice Frankfurter put it: "Investigations, whether by standing or special committees, are an established part of representative government."[5]

Where material is obtained for a parliamentary purpose and is held by the corporate body, it is settled that committee documents have the same standing and are subject to the same controls as other parliamentary information. Rules in the U.S. Congress, for example, provide that when committee hearings are closed to the public, the records may be retained confidentially.[6] The rules also forbid stenographers of standing committees to furnish transcripts of testimony or proceedings to anyone without the authorization of the committee chairman or Speaker of the House.[7] Even materials seized under subpoena can be held on an exclusive basis by the parliamentary committee.[8] Thus committee materials are subject to full control by the parliamentary body, and individual members' abilities to disclose or discuss them may be restricted.

Open and public sessions of legislative bodies are as much a part of representative government as are the investigations of committees. Yet American legislatures traditionally have maintained and exercised a right to hold secret or closed sessions. Closing a session to immediate public scrutiny may also be said to operate as a limitation on full exercise of free speech by parliamentary members.

The assertion of a right of secrecy predates the Union. Several colonial assemblies denounced unauthorized disclosure of secrets or release of documents without permission.[9] The Second Continental Congress passed its well-known "Resolution of Secrecy" on November 9, 1775, and held all its sessions in secret thereafter, forbidding each member, "under the ties of virtue, honor, and love of his country," to divulge what transpired.[10] Under the Articles of Confederation, Congress was given express permission to omit from its official journal any items that might require secrecy.[11] The American Constitution contains a provision that both houses may keep out of the journal materials that "in their judgment require secrecy."[12] Indeed, all sessions of the U.S. Senate up to the Second Session of the Third Congress were secret.[13] Several state constitutions provide for secrecy, using language similar to that of the federal Constitution.[14] The Confederate States in their session congress and in their constitution provided both for secret sessions and deletion from the journal of sensitive material.[15]

The rules of many parliamentary bodies provide for secret sessions and permit deletion from the records of secret material. In the U.S. Senate, standing rules provide for closed-door sessions on motion of any senator and executive sessions (disclosure forbidden) for any of the following purposes: protection of the secrecy of confidential communications made by the President, consideration of treaties, and advice and consent on nominations.[16] Similarly, the House of Representatives may, on motion, clear its chambers.[17] Likewise, committees may hold closed-door sessions, whose secrecy not even the whole House may abrogate.[18]

Since "confidentiality and privilege are essential to many working relationships," the practice of secret deliberation extends well beyond governmental bodies.[19] Cushing describes secrecy as one of the "aggregate privileges" of all parliamentary bodies.[20] Obviously adherence to the principle of a secret session would limit a parliamentary member's fullest right of free speech.

A member's right to disclose may also be limited by his coming into possession of material normally not available for public disclosure, especially "classified" information. Under the general authority of his war powers a U.S. President or other designated official may classify material as "Top Secret," "Secret," or "Confidential."[21] Material under an active classification is "exempted from public disclosure" under the Freedom of Information Act, and anyone who wrongfully does disclose it is subject to federal criminal penalities. While the power to classify is by statute limited to material which"bears directly on the effectiveness of our national defense and the conduct of our foreign relations,"[22] in fact an extraordinary amount of information is routinely classified in dozens of federal bureaus and agencies.[23] The validity of the classification procedure and its effects have been upheld in a number of court decisions. In *Scarbeck v. United States*, the Circuit Court read the Executive Order (10501, predecessor to the present one) as "prohibiting the transfer of all documents officially classified as affecting the national security. . . ."[24] More recently the courts have modified their stance to say that "items should be supressed only if they are found both to be classified and classifiable under the Executive Order."[25] This decision may indicate that courts may make an independent determination of the legitimacy of the original classification. Clearly, however, the present state of the law suggests that classified documents coming into the possession of a legislature or other parliamentary body should not be disclosed.

II. The Member's Right to Free Speech

There is no need to review the centrality of the right of free speech to our political system; instead it is essential to highlight the unique situation of the members of the parliamentary body, particularly of a legislature. Members of legislative assemblies have, beyond the normal freedom of speech, an absolute immunity for remarks made in the course of legislative debate. The Constitution provides that "for any speech or debate in either house, they shall not be questione elsewhere."[26] Most state constitutions have a similar provision,[27] as did the Confederacy.[28]

The privilege of free debate within the assembly, a part of American procedure from the beginning, was hard won in England.[29] In the Articles of Confederation it was provided that "freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress. . . ."[30] It has been asserted that immunity for legislative debate is the one privilege of Parliament which the Founding Fathers placed virtually unchanged into our Constitution.[31] Certainly it is one which has a strong base: the protection of legislators not for their own sake but for their work. Former Senator Sam Ervin has said that the "speech or debate" clause immunity existed so that members of Congress "might conduct the public's business with candor and independence."[32] Cushing sees the privilege extending beyond Congress to parliamentary bodies in general, since the principle is the same: "supporting the rights of the people" by allowing members to carry out their functions without fear of prosecution.[33]

The courts have upheld the privilege, especially where the free-speech issue involves words actually spoken in the legislative chamber or in the obvious conduct of parliamentary business. A frequently cited decision is *Coffin v. Coffin*, wherein the Court held that words spoken in debate were clearly protected by the Constitution.[34] Further, Justice Parsons went on to affirm that a member of the parliamentary body does not hold this privilege at the pleasure of the "but derives it from the will of the people."[35] A series of recent U.S. Supreme Court cases has continued to uphold the privilege, at least insofar as "legislative acts" are concerned. In *United States v. Johnson*, for example, the Court specifically refused to review whether a speech made on the floor of the House by Representative Tom Johnson had been "improperly motivated."[36] The Court unanimously held that judicial inquiry into the reasons why a particular speech had been made ". . . is precisely what the Speech or Debate clause forecloses from inquiry."[37] The Court has also held that a vote on a resolution of exclusion is a legislative act "which may not be inquired into."[38] In a very recent decision, on committee investigations, the Court, speaking through Chief Justice Burger, has held that where legitimate investigatory conduct is at issue "the prohibitions of the Clause are absolute."[39]

A key question becomes: What is a "legislative act" or "investigatory conduct"? It is important to recall that parliamentary immunity, in its origin, was essentially a privilege against outside interference. In England, for example, it does not permit a member to circulate with immunity separate publications of remarks made in Parliament, nor does it afford Parliament's own published reports absolute protection.[40] In our own history the courts have held a similar view. One test came in a 1934 case involving documents circulated by the flamboyant Huey Long. The federal court held that as to what the Kingfish had said on the floor of the Senate there could be no prosecution. But the Court did say that Long could be held liable for the publication and circularizing of libelous documents by having them privately printed and mailed to citizens of Louisiana.[41]

In the recent important case of former Senator Daniel Brewster of Maryland the Supreme Court made its first careful effort to distinguish between those things a congressman does which can be called "legislative acts" and those things which cannot.[42] The Court reviewed prior decisions establishing that speeches, votes, participation in resolutions, committee work, etc., were clearly legislative activity. Then it went on to define a category of congressmen's activity which it labeled "political," including ". . . legitimate 'errands' performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called news 'letters' to constituents, news releases, and speeches delivered outside the Congress."[43] The Court concluded that while such activities are appropriate, they are not entitled to the protection of the "Speech or Debate" clause. As the Court put it: "The only reasonable reading of the Clause, consistent with its history and purpose, is that it *does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself*."[44] This important decision brings into focus the key question facing congressmen today: How far can they go in releasing information or publishing material that they think the public needs to know? For, counterweighed against the privilege of confidentiality for a parliamentary body, there is an equally strongly maintained privilege of disclosure.

The privilege of disclosure has been grounded in the public's "right to know." As James Wilson, perhaps second only to Madison in contributing ideas to the American Constitution, said: "The people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."[45] It is this rationale which has led to a new movement for openness. Some signs are visible in the federal Freedom of Information Act and state open-meetings laws.[46] The same philosophy has led recent Congresses to make extensive studies of the release of congressional information. For example, in the 93rd a joint committee studied the whole question of congressional immunity because, as the committee put it: "The people's representation in the legislative branch is solely dependent on the legislators who make up that body."[47] It was the same philosophy which led Representative Michael Harrington to justify his disclosure of portions of former C.I.A. Director Colby's Armed Services Committee testimony by saying that "he felt a higher obligation to reveal [American] actions [in Chile] than to honor the House rules prohibiting disclosure of secret testimony.[48]

In a representative democracy many elected officials concede, as did Representative Harrington, that they have a duty to disclose as well as a duty to withhold from disclosure. How may this conflict be resolved?

III. Cases in Point

On many occasions, of course, the parliamentary member resolves the secrecy/disclosure dilemma on the side of secrecy by remaining silent, permitting full retention of information by the parliamentary body. But on a number of other occasions in our history members have deemed it essential to disclose, weighing the public's right to know more heavily than the body's right to retain. It will be instructive to examine the best-known cases.

In at least two instances a parliamentary member or committee has directly disclosed confidential information to the public. In 1972 Senator Mike Gravel of Alaska read aloud to a subcommittee portions of the "Pentagon Papers" (portions of which were classified "Top-Secret-Sensitive") and arranged to have the entire forty-seven volumes placed on the public record through publication. Because the publication of classified documents presented a potential criminal violation, a grand jury subpoenaed Dr. Leonard Rodberg, Gravel's aide, for questioning. Gravel intervened to quash the subpoena, and the battle was joined. It was, as one authority put it, "a classic confrontation . . . between avowedly separate and equal branches of government."[49] Senator Gravel's position was that the "Speech or Debate Clause" precluded any questioning of him (or, through his own immunity, his aide) about the matter. The case quickly reached the United States Supreme Court. The Court affirmed its consistent holdings that insofar as the conduct of Gravel in the committee session was concerned, neither he nor Rodberg could be questioned. The Court said: "We have no doubt that Senator Gravel may not be made to answer - either in terms of questions or in terms of defending himself from prosecution - for the events that occurred at the subcommittee meeting. . . ."[50] And, for the purposes of the privilege, the aide and the parliamentary member were to be treated as one. Modern legislative procedure requires, the Court said, research and assistance of such dimension that members of Congress could not function without aides or assistants, so that aides must be treated as "alter egos."[51]

So conduct of a member (in the largest sense) at a committee hearing is within the sphere of legitimate "legislative activity." But Senator Gravel, in his effort to reach the public, did more. He arranged with Beacon Press to have the "Pentagon Papers" published. Was that protected as well? The Court drew the line on the issue of republication. Finding that the publishing arrangements were "in no way essential to the deliberations of the Senate," and unauthorized, either by Congress or committee, the Court held that immunity did not apply.[52] Thus the grand jury could question Rodberg with respect to the publication of the documents so long as their questions assured that "no legislative act is implicated by the questions."[53]

A year later the Court dealt with another case of direct disclosure of parliamentary information in Doe v. McMillan.[54] Here a subcommittee of the House Committee on Education prepared a report on schools in the District of Columbia. The report went to the full committee, then to the House, which ordered it printed by the U.S. Government Printing Office. In the report were personal records (test papers, absence sheets, etc.) of named students. Several parents of these schoolchildren instituted suit against the committee and the G.P.O. Mr. Justice White's opinion maintained the Brewster-Gravel legislative/non-legislative distinction. As to the congressmen-committee members the Court held that the "complaint in this case is barred by the Speech or Debate Clause," because the material was gathered in legitimate "legislative acts."[55] While the inclusion of students' names may have been unwise, the Court would not substitute its own judgment for that of Congress where the matter was part of the legislative function.

But the republication by the Government Printing Office, the Court held, was not an essential part of legislative activity, and the G.P.O. was not immune from suit. The Court maintained that the central purposes of the Speech or Debate immunity would not suffer if "those who . . . distribute actionable material to the public at large have no automatic immunity."[56]

Taken together, the Gravel and McMillan cases establish a distinction (for the activities of the parliamentary member) between things done in directly carrying out legislative tasks and things done in what the Court calls the "political" role. But the inquiry cannot end there, for there is another way the parliamentary member can get information to the public: through the by-now-familiar procedure of the "leak."

One of the first cases of disclosure by leak came during the period of the pre-War-of-1812 embargo. In a situation with some striking similarities to the recent Daniel Schorr case, one Nathaniel Rounsavell, editor of the Alexandria Herald, received confidential information from an unnamed member of the House about the secret debates on the embargo. Like Schorr, Rounsavell did not publish the material for his own journalist's employer but sold it to the Spirit of Seventy-Six, a left-wing paper of the period. Like Schorr he was called before the House, where the question was put: "From what member did you collect the information...?" And, like Schorr, Rounsavell refused to answer. The House debated what to do, but, saving his colleagues embarrassment and Rounsavell possible punishment, the representative who had leaked the debate confessed, and the issue was ended.[57]

Among the other famous leaks was the 1848 incident in which the New York Herald published a secret treaty between the United States and Mexico, apparently as a result of a member's disclosure. The Senate, unable to find the source, brought a contempt proceeding against the officers of the newspaper. The defendants resisted on the ground that the Constitution does not permit contempt proceedings by the Senate except against its own members. The issue was litigated. A federal court upheld the Senate on the common-law principle that every parliamentary body has a right to protect itself from insult and contempt.[58] The House of Representatives had also by this time judicially established its right to contempt proceedings and punishment.[59] So both Houses of the American Congress, drawing on a long history of British and colonial precedents, had historically maintained the potential to plug leaks by the use of the contempt power.[60]

Thus the stage was set for Daniel Schorr. The facts are well known. CBS's Schorr obtained a copy of the Pike Committee Report on the CIA and arranged to have it published by the Village Voice. The House spent what one source estimated as "four months and $150,000" trying to locate the leak.[61] But Schorr refused to name his source. His actions brought into focus the key issue: Does Congress, as a parliamentary body, have a right and, as a separate question, the ability to keep secrets? To find out, the House asked for a report from its Committee on Standards of Official Conduct. In its report the committee reached certain conclusions relevant to the subject at hand. First, it said, "there can be no question about the need to protect certain types of classified information from unauthorized disclosure."[62] Only by protecting such information could the House play a role in defense legislation, the Committee argued, and, therefore, "unauthorized disclosure of classified information jeopardizes the ability of the House and threatens the very ability of the House to deal with foreign policy, international affairs, and intelligence operations."[63] The committee questioned Daniel Schorr and others and voted finally not to cite him for contempt of the Congress, although maintaining that its action "establishes no precedent regarding the validity of any claim of privilege...."[64] They concluded, though, that the House "has the authority, indeed the duty, to investigate possible violations of its resolutions and protective orders...in order to protect the integrity of the legislative process."[65] The question is how to do it?

Conclusion

Inevitably, in a free society, parliamentary members will feel compelled to disclose, outside the body, parliamentarily controlled information. From a legal perspective the key questions are: Who is to determine the appropriateness of such disclosure and who ought to have the power to regulate it? Who should be the ultimate arbiter of when the public's "right to know" does or does not outweigh the parliamentary body's "right to retain"?

The first possible answer is to leave the policing of inappropriate disclosure to the parliamentary body itself. The body would determine when disclosure of information to the public was prejudicial to its own interests and devise its own methods and procedure for punishing it. Members who disclose confidential information would therefore be answerable to the body but not to any other branch of government or authority. In effect, the legislative privilege of the Speech or Debate clause would be extended to the "public informer" role of the legislator or parliamentary member.

The argument has authentic historical roots. In 1797 a Virginia congressman was investigated by a federal grand jury for sending antiadministration newsletters to his constituents. Thomas Jefferson protested the grand jury's action, in a lengthy essay, as an intrusion upon legislative privilege. He argued that an exchange of views between legislator and constituent is an essential part of a participatory democracy and should be protected fully as much as any other communication from the member.[66] Jefferson's argument is cited approvingly by the dissenting Mr. Justice Brennan in U.S. v. Gravel as "certainly the most cogent analysis of the privileged nature of communication between Congressman and public."[67] But Brennan's conclusion seems overstated and, at least, inappropriate to the Gravel case. Congressman Cabell, whose conduct and investigation prompted Jefferson's essay, was simply communicating to his constituents his criticism of a particular government policy. He was not, as Gravel was, directly communicating material "classified" by appropriate agencies as directly affecting the national defense. Brennan takes insufficient account, moreover, of the political climate of 1797 and Jefferson's own strong hostility to the policies of the Adams administration. Whatever is true of Jefferson's undeniably eloquent defense of the general proposition of freedom of communication between legislator and the people (with which few would disagree), it is equally true that, in the Cabell case, Jefferson simply was not writing about the Gravel-type disclosure of confidential parliamentary opposition.

More to the point as a defense of full parliamentary control is an article inserted by Senator Sam Ervin in Congressional Record in 1972.[68] Ervin argued that the tendency of the Court to become involved in the disclosure controversy, evidenced by the Gravel and Brewster cases, was an unprecedented invasion of congressional perogative. He saw the decisions as a slap at Congress's ability to punish misbehavior and an unwarranted limitation of the Speech or Debate immunity. Ervin asserted that "in these cases the Court has tinkered with the very heart of the Constitution."

The answer to the problem, Senator Ervin concluded, was for Congress to reassert its rightful authority over the conduct of its members. A broadened definition of "legislative activity" in the investigative field was needed, including "informing our constituents of our findings in our investigations. If there are abuses , Ervin answers that point as well: "...we are not unaccountable....Our constituents can vote us out of office...,.And the Senate can....penalize us for activity it deems inappropriate."[69]

Ervin's position is not without support. The committee Report on Congressional Immunity (see above) concluded: "....the doctrine will be reestablished by legislation in its traditional role of enforcing and ensuring the independence and integrity of the legislative branch...."[70] Legal authorities agree that the court decisions have not yet precluded action in this area.[71] Federal courts themselves have upheld at every level the actions of Congress in self-discipline cases.[72]

Congress believes that it has the authority to protect itself from abuses of its processes. Further, it clearly has some powerful tools: the contempt and exclusion powers.[73] Why not, then, simply leave it to Congress? The answer is that putting all control over secrecy, disclosure, immunity, and liability to the Congress itself gives it too much unchecked authority and permits it to be as arbitrary as it wishes in deciding what to punish and how to punish it. The Supreme Court phrased the problem this way in Brewster:

> The process of disciplining a member in the Congress is not without countervailing risks of abuse....An accused member is judged by no specifically articulated standards and is at the mercy of almost unbridled discretion of the charging body that functions at once as accuser, prosecutor, judge and jury and from whose decision there is no established right of review.[74]

He who would violate the confidentiality of the body thus would be in a wholly untenable position of being unaware of the standards by which to measure his conduct and not even certain of a key right of us all : resort to the courts.

The preferable--indeed, the unavoidable--choice is to leave the courts the difficult task of weighing issues in disclosure/confidentiality controversies. There are several arguments in favor of court control:

First, it may be suggested that if the courts do not intervene and leave the disclosure decision entirely to the legislative body, the effect is to put the remarks of parliamentary members above the law. So argued Senator Jesse Helms, who suggested that to extend parliamentary immunity (and thereby to reduce judicial inquiry) was to "create a certain elite of privileged classes who are above the law and beyond the scope of effective scrutiny and restraint."[75]

A second argument in favor of court supervision of disclosure is that, if left to themselves, parliamentary bodies will not do an effective job of determining what should and should not be disclosed. As to the U.S. Congress, certainly its track record for oversight is not impressive. Indeed, part of the reason for the recent disclosure controversy was Congress's belief that the less it knew about some subjects (the CIA, for example), the better.[76] Where there have been apparent violations of disclosure or other procedures, Congress has been very reluctant to judge contempt citations. The dismal failure to oversee Senator McCarthy or HUAC is instructive.[77]

The final argument for court control is that if Congress does carry out its oversight tasks and does report to the people, it undercuts the effective handling of American foreign policy. The argument is by now a familiar one: the State Department's extensive range of negotiations and day-to-day relationships depend on confidentiality.[78] Valuable sources of information will dry up if these sources know what they tell will be exposed by Congress to public scrutiny.[79] The government made this argument its area of principal reliance in the "Pentagon Papers" case: that publication would destroy our reputation for being able to keep secrets and thus inhibit diplomacy.[80]

Historically, where competing interests and rights are at stake, especially fundamental ones, we have turned to the courts to resolve them. The confidentiality/disclosure controversy is such an area. The rights of parliamentary bodies to control their own information creates a privilege to withold. A member's unique version of the right of free speech creates a privilege to disclose. Inevitably collisions between these privileges will arise, as both parliaments and members test their limits. Leaving the final determination of those limits to one of the parties in interest seems inappropriate.

The confidentiality/disclosure controversy raises problems that, as all from Thomas Jefferson to Sam Ervin have agreed, lie close to the heart of our system. Its ultimate resolution will hold considerable interest for those concerned with the most basic of rights: freedom of speech.

FOOTNOTES

[1] Asher Hinds, Parliamentary Precedents of the House of Representatives of the United States (Washington: U.S. Government Printing Office, 1899), Vol. 3, 2663; Vol. 6, 586. (Hereafter referred to as Hinds' Precedents.)

[2] 6 Hinds' Precedents 587; see also 3 Hinds' Precedents 2663; 46th Congress, 1st Session Journal, pp. 181-186.

[3] United States v. Ballin 144 U.S.1 (1892); see also United States v. Smith 286 U.S. 6 (1932), where, even though a rule governing internal procedure was overturned, the right of the Congress to make it was explicitly recognized. On the state and local level see Witherspoon v. State ex rel West 138 Miss. 310, 103 So. 134 (1925) (Mississippi State Senate Rules); Landes v. State ex rel Matson 160 Ind. 479, 67 N.E. 189 (1903) (Greencastle City Council Rules); People ex rel McMahon v. Davis 284 Ill. 439, 120 N.E. 326 (1918) (rules of Chicago Board of Aldermen).

[4] McGrain v. Dougherty 273 U.S. 135, 174 (1927).

[5] Tenney v. Brandhove 341 U.S. 367, 377 (1951). On the general subject of committee investigation see James M. Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 Harvard Law Review 153 (1926).

[6] Constitution, Jefferson's Manual, and Rules of the House of Representatives. Prepared by Louis Deschler. (Washington: U.S. Government Printing Office, 1973. 92nd Congress, 2nd Session, House Doc. No. 384). Jefferson's Manual, Rule XI, s735 (f) (2).

[7] Clarence Cannon, Parliamentary Precedents in the House of Representatives of the United States (Washington: U.S. Government Printing Office, 1936), Vol. 8 s3459.

[8] Dombrowski v. Eastland 387 U.S. 85 (1967).

[9] Mary Patterson Clarke, Parliamentary Privilege in the American Colonies (New Haven: Yale University Press, 1943), p. 179.

[10] U.S. Congress, House, Documents Illustrative of the Formation of the Union of American States, 69th Congress, 1st Session, 1927. House Document 398, p. 18.

[11] Articles of Confederation, Article IX.

[12] Constitution of the United States, Article I, s5.

[13] 1 Hinds' Precedents 936.

[14] See, e.g., Constitution of the State of Ohio, Article II, s13.

[15] U.S. Congress, Senate, Journal of the Confederate States of America, Senate Document 234, 58th Congress, 2d Session, 1904, pp. 18, 19, 852.

[16] *Senate Manual, Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate*. Prepared by W. F. Bookwatter and Darrell St. Claire. (Washington: U.S. Government Printing Office, 1953. 83rd Congress, 1st Session, Senate Document No. 10). Rules XXXV; XXXVI (2), (3), (5); XXXVII; XXXVIII (2).

[17] *Jefferson's Manual XVIII*; House Rule XXX.

[18] House Rule XI, 25(a). A specific Speaker's ruling confirming the rule was made during a committee investigation of the Credit Mobilier scandal. See Hinds' Precedents 4565; 42nd Congress, 3rd Session, *Congressional Globe*, pp.353-357.

[19] Louis Henkin, "The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers," 120 *University of Pennsylvania Law Review* 271 (1971).

[20] Luther Cushing, *Law and Practice of Legislative Assemblies* (Boston: Little, Brown and Company, 1874), 623. Hereafter referred to as *Cushing's Manual*.

[21] *Executive Order 11652*, March 8, 1972, 37 *Federal Register* 5209.

[22] 50 U.S.C.A. 401.

[23] See Martin Shapiro, *The Pentagon Papers and the Courts: A Study in Foreign Policy Making and Freedom of the Press* (San Francisco: Chandler, 1972), p.47.

[24] *Scarbeck v. United States* 317 F. 2d 546 (D.C. Cir. 1963).

[25] *Alfred Knopf, Inc. v. Colby* 509 F. 2d 1362 (D.C. Cir. 1975).

[26] *Constitution of the United States* Article I,6.

[27] See, e.g., *Constitution of the State of Ohio* Article II,12.

[28] *Constitution of the Confederate States of America* Article I,6.

[29] See Carl Wittke, *The History of English Parliamentary Privilege* (New York: DaCapo Press, 1970; reprint of 1921 edition).

[30] *Articles of Confederation* Article V.

[31] Robert J. Reinstein and Harvey A. Silverglate, "Legislative Privilege and the Separation of Powers," 86 *Harvard Law Review* 1113, 11138-9 (1973).

[32] Sam Ervin, "The *Gravel* and *Brewster* Cases: An Assault on Congressional Independence," 118 *Congressional Record* 28, 465 (August 16, 1972).

[33] *Cushing's Manual*, 603.

[34] *Coffin v. Coffin* 4 Mass. 1, 16 (1808).

[35] 4 Mass. 27.

[36] *United States v. Johnson* 383 U.S. 169 (1966).

[37] 383 U.S. at 180.

[38] *Powell v. McCormack* 395 U.S. 486, 497 (1969).

[39] *Eastland v. United Serviceman's Fund* 421 U.S. 491, 505 (1975).

[40] Wittke, pp. 30-31.

[41] *Long v. Ansell* 69 F. 2d 386 (D.C. Cir., 1934). Accord: *McSurely v. McLellan* 521 F. 2d 1024 (D.C. Cir., 1975).

[42] United States v. Brewster 408 U.S. 501, 504 (1972).

[43] 408 U.S. at 512.

[44] 408 U.S. at 528. A state supreme court has applied the same reasoning. See Steiger v. Superior Court of Maricopa County 112 Ariz. 1, 536 P. 2d 689 (1975).

[45] Documents Illustrative of the Formation of the Union, p. 520.

[46] 5 U.S.C.A. 552; Ohio Revised Code 121.22, e.g.

[47] "The Constitutional Immunity of Members of Congress," Report of the Joint Committee on Congressional Operations (Washington : U.S. Government Printing Office, 1975) 93rd Congress, 2d Session. Senate Report No. 93-896, p.2.

[48] "The Word He Wouldn't Say," The Nation, Vol. 221, No. 15, p. 451 (Nov. 8, 1975).

[49] Reinstein and Silverglate, p. 114.

[50] Gravel v. United States 408 U.S. 606, 616 (1972).

[51] 408 U.S. at 617.

[52] 408 U.S. at 622.

[53] 408 U.S. at 627.

[54] 412 U.S. 306 (1973).

[55] 412 U.S. at 312.

[56] 412 U.S. at 316.

[57] 1 Hinds' Precedents 104-5; 12th Congress, 1st Session, Annals 1266.

[58] Ex Parte Nugent 18 Fed. Case 471, 481 (Case No. 10, 375) (D.C. Cir. 1848). Same result In Re Chapman 166 U.S. 661 (1897) ("inherent power of self-protection").

[59] Anderson v. Dunn 6 Wheat. 204, 5 L. Ed. 242, 247 (1821). Accord: Kilbour v. Thompson 103 U.S. 168 (1880) (resistence to subpoena in investigation of Jay Cooke and Co.).

[60] Charles Potts, "Power of Legislative Bodies to Punish for Contempt," 74 University of Pennsylvania Law Review 691, 696-704 (1974).

[61] "Intelligence Forever," The Nation Vol. 222, No. 7, p. 66 (July 31, 1976).

[62] U.S. Congress, House, Committee on Standards of Official Conduct, Report on Investigation Pursuant to H. Res. 1042 Concerning Unauthorized Publication of the Report of the Select Committee on Intelligence. House Report No. 94-1754, 94th Congress, 2d Session, 1976, p. 4. (Hereafter referred to as "Conduct Committee Report.")

[63] "Conduct Committee Report," p.5.

[64] "Conduct Committee Report," p.39.

[65] "Conduct Committee Report," p.5.

[66] 8 The Works of Thomas Jefferson 322-327. (Ford ed. 1904).

[67] United States v. Gravel 408 U.S. at 655.

[68] 118 Congressional Record 28, 465 (August 16, 1972).

[69] 118 Congressional Record 28, 465-28, 468.

[70] "Constitutional Immunity of Members of Congress. . ." pp. 3, 53. See note 47.

[71] Harold Edgar and Benno Schmidt, "The Espionage Statutes and Publication of Defense Information," 73 Columbia Law Review 929, 930 (1973).

[72] Supreme Court: Tenney v Brandhove 341 U.S. 367; (1951) Circuit Court: Barsky v. United States 167 F. 2d 241 (D.C. Cir. 1948); District Court: Methodist Federation for Social Action v. Eastland 141 F. Supp. 729 (D.C.C., 1956).

[73] See Marshall v. Gordon, 243 U.S. 521 (1917) and Jurney v. McCracken 294 U.S. 125 (1935). Legislative bodies can expel members for violations of secrecy. See Senate Rule XXXVI, Para. 4: "Any Senator who shall disclose the secret or confidential proceedings of the Senate shall be liable. . . to suffer expulsion from the body."

[74] United States v. Brewster 408 U.S. at 519.

[75] "Constitutional Immunity of Members of Congress. . ." p. 58.

[76] "Constitutional Immunity of Members of Congress. . ." p. 56; See also Martin Shapiro, The Pentagon Papers and the Courts: A Study in Foreign Policy Making and Freedom of the Press (San Francisco: Chandler Publishing Company, 1972), p. 26.

[77] Carl Beck, Contempt of Congress: A Study of the Prosecutions Initiated by the Committee on Un-American Activities (New York: DaCapo Press, 1974), p. 185.

[78] Robert J. Manning (Asst. Sec. State), "Foreign Policy and the People's Right to Know," 50 Department of State Bulletin 868, 871 (1964).

[79] William P. Rogers (then Sec. of State), News Conference, July 1, 1971, quoted in Shapiro, pp. 86-87.

[80] Shapiro, p. 46.

SPINOZA: ON FREEDOM OF THOUGHT AND SPEECH

Martha Womack Haun
University of Houston

Much as the genius and outspokenness of Milton in his Areopagitica (1644) had gone unnoticed in England a few decades before, the fate of the writings of one Benedict De Spinoza (1632-1677) just across the English Channel in Amsterdam was similar. Spinoza's Tractatus Theologico Politicus was first published anonymously in 1670.[1] While stirring much unrest among its readers, like the other works of Spinoza, it failed to be truly appreciated and recognized until some 100 years later. Within his lifetime, however, Spinoza was recognized as a man of great learning. "Before the appearance of the Tractatus Theologico Politicus, he had published nothing which could shock the susceptibilities of Christians, and he was known to be a complete master of Cartesianism, then regarded as the consummation and crown of learning."[2] In his introduction to the basic works of Spinoza, Elwes points out that no traces of Spinozism are found among German philosophers as late as Kant (1724-1804) but that, in contrast "Hegel (1770-1831) has declared that 'to be a philosopher one must first be a Spinozist.'"[3]

The purpose of this examination is to survey the general philosophy of Spinoza with special emphasis on ideas related to individual freedom of expression and the relationship of that freedom to sovereignty of the state. Observations about Spinoza's background and general philosophy are followed by a more specific consideration of his philosophy of freedom of thought and expression.

Background and General Philosophy

In Amsterdam, November 24, 1634, Baruch (later Benedict) De Spinoza was born to parents believed to be either Portuguese or Spanish Jews who were seeking refuge from the current "rigours of the Inquisition in the Peninsula."[4] Spinoza's thorough education in the Jewish High School included training as a lens polisher and a knowledge of French, Italian, and German in addition to Spanish, Portuguese, and Hebrew,which were "almost his native tongues." Although he wrote Dutch with difficulty, he also set out to learn Latin.[5] Such a knowledge of languages naturally accelerated his learning in other areas.

At twenty Spinoza severed his relationship with the Jewish people. Santayana summarizes: "He was excommunicated by the Synagogue, at the age of twenty, for his heretical opinions; which were that God might have a body (namely, the whole world of matter), that angels might be mere visions of the mind, and that the Bible said nothing of the immortality of the soul."[6] Santayana describes Spinoza as a scholar of repute who "founded his philosophy partly on a rationalized Judaism, partly on the system of Descartes, and in politics, on the system of Hobbes."[7]

Of fundamental importance in understanding the philosophy of Spinoza is his Jewish background: "It determined the isolation, and when he had separated himself from the Synagogue, the independence of his life and thought; and it opened to him Hebrew learning and traditions which most writers of his day were ignorant of altogether."[8] Of primary importance to his philosophy is Spinoza's definition of God as "simply the universe in all its extent and with all its details."[9] Santayana adds further explanation to this concept:

> . . . the mind of God is not God Himself, in His entirety, but only one of his attributes or manifestations. It is all the mentality that is scattered over space and time, the diffused consciousness that animates the world. To say that the mind of God is revealed to Moses or is manifest in Christ is

> much as if we said that the spirit of music was revealed to Bach, or was manifest in Beethoven.[10]

Spinoza was "strongly influenced by Descartes but unwilling to accept his dualistic concept," in which "God (or mind) and man (or nature) are distinct from one another."[11] By scrupulously following Descartes's methods Spinoza contended that "God and the universe are one (pantheism)," a clear rejection of Cartesian dualism.[12]

The unparelleled progress of mathematics and physics in this century transformed the view of the nature of the material world as well as the nature of true knowledge so that a barrier was created between the Middle Ages and the Renaissance, making those "earlier ideas appear fanciful, remote, and at times unintelligible."[13] In contrast "the application of mathematical techniques -- and language -- to the measurable properties of what the senses revealed, became the sole true method of discovery and of exposition."[14] Berlin points out that this attempt to give reasoning a kind of mathematical structure is characteristic of Descartes, Leibnitz, and Hobbes as well as Spinoza.[15] This structure is probably best observed in Spinoza's works in his clear delineation of axioms and propositions and their systematic presentation in his Ethics. Berlin summarizes why it was felt that what was said should be stated in these quasi-mathematical terms; ". . . for language less precise may turn out to conceal the fallacies and obscurities, and the confused mass of superstitions and prejudices, which characterized the discredited theological or other forms of dogmatic doctrine about the universe, which the new science had come to sweep away and supersede."[16]

Santayana provides a concise summary of some of Spinoza's views which contributed to the characterization of his thought as scandalous: ". . . Spinoza denied final causes, or purposes at work in nature, and . . . in their ordinary sense, he denied the immortality of the soul, free-will, and moral responsibility."[17] These doctrines, that might otherwise "have passed for simple materialism," became "positive blasphemy" when identified with God and the teaching that all things, "whether in the eyes of men. . . were good or evil, mean or noble, were integral parts of the divine being."[18]

This pantheistic view did, however, endear him to a group of "romantic Germans, who were poetical, emancipated souls and great lovers of nature." One of them pronounced Spinoza "inebriated with God -- ein Gottenbetrunkener Mensch." [19]

The need for toleration by both government and private sects is "what the interests of the state require." Santayana stresses that Spinoza "propounds the principles of liberalism in these matters with remarkable foresight and precision."[20] He goes on to say that "Happiness . . . is what all Spinoza's maxims aim to secure" and that this is attained through reason, which "establishes a sort of resigned and peaceful strength in the soul, founded on renunciation of what is impossible and cooperation with what is necessary."[21] Therefore, Spinoza clearly denounces any government that is not an expression of "the organic force of society" as well as any religion that would distort "the natural reason and conscience of man."[22]

A notion of Spinoza's which has great value is his concept of the "absolutely, infinite universe", in which "man, with all his works was an incident, and a fragment of a fragment."[23]

Spinoza was also a fatalist "regarding everything that happens as perfectly inevitable, pre-ordained and predictable."[24] In his doctrine of human freedom and immortality Spinoza most departed from Jewish ideas and approached the atomistic theory of the Greeks.[25] This view is clearly set forth in his Political Treatise:

> For the bounds of nature are not the laws of human reason, which do but pursue the true interest and preservation of

> mankind, but other infinite laws, which regard the eternal order of universal nature, whereof man is an atom; and according to the necessity of this order only are all individual beings determined in a fixed manner to exist and operate.[26]

Freedom of Thought and Speech

By natural right man is the master of his own thoughts and cannot abdicate this freedom of judgment. This position is clearly and forcefully set forth by Spinoza in the opening passages of chapter XX of his Tractatus Theologico Politicus:

> If men's minds were as easily controlled as their tongues, every king would sit safely on his throne, and government by compulsion would cease; for every subject would shape his life according to the intentions of his rulers, and would esteem a thing true or false, good or evil, just or unjust, in obedience to their dictates. However . . . no man's mind can possibly lie wholly at the disposition of another, for no one can willingly transfer his natural right of free reason and judgment or be compelled so to do. For this reason government which attempts to control minds is accounted tyrannical, and it is considered an abuse of sovereignty and a usurpation of the rights of subjects . . . .[27]

Although Spinoza viewed man as an atom or fragment in an absolutely infinite universe, the above position is consistent with his position that man has a conscience and is capable of natural reason.[28] Accordingly he recognizes that the state "can never prevent men from forming judgments according to their intellect, or being influenced by any given emotion . . . .[29]

As a kind of recourse, however, Spinoza contends that the state does have "the right to treat as enemies all men whose opinions do not . . . coincide with its own." He is not, however, discussing "its strict rights, but its proper course of action."[30] He goes on to explain that the state is limited from violent recourse against such persons, since this ultimately results only in extreme peril to itself: ". . . since every man is by indefensible natural right the master of his own thoughts, it follows that men thinking in diverse and contradictory fashions, cannot, without disastrous results, be compelled to speak only according to the dictates of the supreme power."[31]

Since contradictory opinions are inevitable in any society, and it cannot be denied that "authority may be as much injured by words as by actions,"[32] and because this freedom "cannot be entirely denied to subjects," it is nevertheless the case that "unlimited concession would be most baneful."[33] It thus becomes necessary to determine the extent of such freedom without endangering either the "peace of the state, or the power of the rulers." This necessitates a brief examination of the purposes of government, which Spinoza states as: ". . . not to change men from rational beings into beasts or puppets, but to enable them to develop their minds and bodies in security . . . the true aim of government is liberty."[34] In order for the government to sustain such liberty for the individual the individual must make a sacrifice. He must abdicate his right to act solely on the basis of his own judgment:

> . . . the individual justly cedes the right of free action, though not of free reason and judgment; no one can act against the authorities without danger to the state, though his feelings and judgment may be at variance therewith; he may even speak against them, provided that he does so from rational conviction, not from fraud, anger, or hatred, and provided that he does not attempt to introduce any change on his private authority.[35]

It is this right to act against the state or to verbally agitate to such an extent that action is imminent that Spinoza denies to the individual.

> . . . if he accuses the authorities of injustice, and stirs up the people against them, or if he seditiously strives to abrogate the law without their consent, he is a mere agitator and rebel . . . an individual may declare and teach what he believes, without injury to the authority of his rulers, or to the public peace; namely by leaving in their hands the entire power of legislation as it affects action. . . .[36]

"Seditious strivings" on the part of the individual are definitely not to be condoned. The power of legislation belongs to the government. At the same time, however, the government has the clear responsibility to "allow freedom of philosophical speculation no less than of religious belief," although abuses or inconveniences may occur:

> . . . from such freedom inconveniences may sometimes arise, but what question was ever settled so wisely that no abuses could possibly spring therefrom? He who seeks to regulate everything by law, is more likely to arouse vices than to reform them. It is best to grant what cannot be abolished, even though it be in itself harmful.[37]

This apparent freedom of the state--or right over men--actually is for the benefit of men, since it ultimately enables them to live harmoniously with each other no matter how "diverse, or even openly contradictory their opinions may be."[38] However, laws attempting to limit expression of ideas (not action) prove to be useless if not actually harmful. "Men, as generally constituted, are most prone to resent the branding as criminal of opinions which they believe to be true . . . laws directed against opinions . . . are adapted . . . such laws are almost always useless."[39] Spinoza goes on to stress that in a democracy (which he has already shown in Chapter XIV to be "the most natural form of government") members submit to control by the authority over actions but "not over . . . judgment and reason. . . . the voice of the majority has the force of law, subject to repeal if circumstances bring about a change of opinion." [40] A departure from the natural condition of mankind exists when this "power of free judgment" is withheld and the end result is a government that becomes more tyrannical.[41] Spinoza concludes his treatise with a statement of the most desirable position for the state to assume: ". . . the safest way for a state is to lay down the rule that religion is comprised solely in the exercise of charity and justice, and that the rights of rulers . . . (sacred or religious) should merely have to do with actions . . . every man should think what he likes and say what he thinks."[42]

Consistent with the classical liberalist tradition associated with Milton, Jefferson, and Mill, Spinoza upholds the right of the individual to freedom of expression of thought and speech. Although Spinoza does not specifically mention the press, it seems clear from the tone of his writing that the freedom he describes is applicable whether the individual chooses to think, speak privately or publicly, write, and/or publish an essay or newspaper.

The individual's relationship to God was not to be dictated by the church any longer but rather existed independently. Therefore to violate the free and open expression of ideas would in effect be a violation against God (Nature), i.e., against what is natural and inherently right. The choice of expression belongs naturally to the individual.

Spinoza's is largely a negative view of liberty--protection from the sovereign power, whether it be church or civil state. There is no apparent concern with whether men have equal ability to express themselves or whether the state should provide education or some other means for increasing an individual's capacity or opportunity for expression of his thoughts and ideas.

No direct mention is made of the self-righting process so trusted in by Milton and Jefferson. Neither does Spinoza express any concern for the possible "tyranny of the majority" about which Mill so aptly alerts his readers in his essay On Liberty.

Spinoza's position seems to be that the Platonic ideal Truth need not be sought; rather that the will of the majority automatically represents what is most desirable because of its natural derivation (if unimpeded by the state except for seditious activity) and is therefore of God.

Conclusion

Unable to abdicate his freedom of judgment, the individual is master of his own thoughts. Since the state cannot control thought, attempts to do so would be useless, disastrous, and a self-punishment. At the same time, however, unlimited freedom would likely result in abuse and injury to the state. Therefore, the point where the state may intervene for self-protection is when activity becomes seditious or when speech is clearly tantamount to such activity (similar to Mill's later concept of a "clear and present danger"). Expression in thought and speech may belong to the individual,but action belongs to the state (determined by the choices of the majority). This expression-action distinction, which was later to form the base of Thomas Emerson's system, is central to the philosophy of Spinoza. Attacked as an atheist, Spinoza's view of an all-embracing naturalistic God was condemned as impossible and heretical by the contemporary Jews and Christians alike.[43] More specifically,as Smith points out, the powerful apologist for faith, Leibnitz described two sects of naturalists: "the Epicurean followers of Hobbes and the Stoic disciples of Spinoza,"[44] and maintained that "there is no one who does not esteem the battle against the atheists as necessary to the preservation of Christianity. All theologians of all schools ought to join forces to crush these men.[45] All the powers of the learned should be united to beat down that monster atheism and to prevent this evil from creeping further among us; for from it nothing may be expected but universal anarchy and the subversion of human society."[46]

The words of Snyder may provide a fitting word of both summary and conclusion in characterizing Spinoza: "In an era of voluptuous epicureanism, this pious, virtuous, God-intoxicated man lived the simple life of a lens polisher. Few human beings have ever been more maligned on the one hand and more venerated on the other than was this great genius."[47]

FOOTNOTES

[1] See The Chief Works of Benedict De Spinoza, trans. with an introd. by R.H.M. Elwes, Dover Publications, Inc. (New York: 1951).

[2] Elwes, "Introduction," p. xiv.

[3] Elwes, p. viii.

[4] Elwes, p. x.

[5] Elwes, p. xi.

[6] G. Santayana. "Introduction," in The Ethics of Spinoza and "De Intellectus Emendatione". (ed.) Ernest Rhys. J.M. Dent and Co. (London).

[7] Santayana, p. ix.

[8] Santayana, p. ix.

[9] Santayana, p. x.

[10] Santayana, p. x.

[11] Louis L. Snyder. The Age of Reason. D. Van Nostrand Co., Inc. (Princeton, New Jersey: 1955), p. 33.

[12] Snyder, p. 33.

[13] Isaiah Berlin (ed.). The Age of Enlightenment: the 18th Century Philosophers. The New American Library (New York: 1962), pp. 14-15.

[14] Berlin, p. 15.

[15] Berlin, p. 15.

[16] Berlin, p. 15.

[17] Santayana, p. vii

[18] Santayana, p. vii.

[19] Santayana, p. viii.

[20] Santayana, p. xii.

[21] Santayana, p. xv.

[22] Santayana, p. xvi.

[23] Santayana, p. xxi.

[24] Santayana, p. xvii.

[25] Santayana, p. xvii.

[26] See Elwes translation; Ch. II, "Of Natural Right," pp. 294-95.

[27] Elwes, p. 257.

[28] Discussed earlier in this chapter.

[29] Elwes, p. 258.

[30] Elwes, p. 258.

[31] Elwes, p. 258.

[32] Elwes, p. 258.

[33] Elwes, p. 258.

[34] Elwes, p. 259.

[35] Elwes, p. 259.

[36] Elwes, p. 259.

[37] Elwes, p. 261.

[38] Elwes, p. 263.

[39] Elwes, p. 262.

[40] Elwes, pp. 263-64.

[41] Elwes, p. 264.

[42] Elwes, p. 265.

[43] Snyder, p. 33.

[44] Preserved Smith. The Enlightenment: 1687-1776. Collier Books (New York: 1962), p. 435.

[45] Smith, P. 435, quoting Samtliche Schriften, i, 81 (1669).

[46] Smith, p. 436, quoting Samtliche Schriften, i, 85 (1670).

[47] Snyder, p. 33.

IMPLICATIONS OF HERBERT MARCUSE'S THEORY OF FREEDOM FOR FREEDOM OF SPEECH

Joyce Flory
Northeastern Illinois University

Herbert Marcuse, apostle of the student left of the 1960's, provides the theorist of freedom of speech with profound criticisms of its practice, particularly as it functions in current society. Drawing his philosophy from the dialectical tradition of Hegel and Marx, the existentialism of Heidegger, and the psychoanalytic theory of Freud, Marcuse argues that tolerance as currently understood and practiced forms a repressive tendency within society. Marcuse makes clear his position in his Essay on Liberation:

> The author is fully aware that, at present, no power, no authority, no government exists that would translate liberating tolerance into practice, but he believes that it is the task and duty of the intellectual to recall and preserve historical possibilities which seem to have become utopian possibilities.[1]

MARCUSE'S VIEW OF FREEDOM: AN OVERVIEW

Marcuse vacillates between two apparently contradictory ideas of freedom.[2] Marcuse partly upholds the liberal view of freedom, defining freedom as doing what one chooses to do and as the absence of restraint. Advocated in various forms by Hobbes, Locke, and Thoreau, this view supports a minimal role for government.[3] It permits government to exercise control only to the extent that it prevents persons from harming one another.

Marcuse, however, fails to restrict himself to this liberal view. Like Plato and Hegel, he views freedom as the capacity to implement the "ought" and to perfect the self.[4] Both Plato and Hegel view the self as a field of conflicting forces. While government must function to prevent harm to its members, so does one aspect of the self function to govern and restrain the whole self. If a conflict exists within a person between reason and passion, that person is only free if his passions are under the control of reason. However, if his passions reign supreme, he will not have freedom despite the absence of governmental control.

Marcuse thus alternates between liberal theory and the theory of perfectibility. He believes that society must restrain individuals and limit their freedom of choice. He rejects the notion that the opportunity to exacerbate violence and repression constitutes part of freedom. Nor does he believe in the free market place of ideas. Instead he views the dialogue and exchange of ideas as weighted heavily on the side of violence and suppression.

With violence and suppression already in control society hardly practices neutrality in allowing all persons to speak freely; rather, it confers an advantage to those who espouse violence and suppression. Despite his pessimism concerning the practice of free speech in current society Marcuse justifies its existence and outlines recommendations for its restoration through the revolutionary process.

A DEFINITION OF TOLERANCE

Marcuse views tolerance as government without violence or "surplus repression." This definition distinguishes Marcuse, since modern democratic society views tolerance as open acceptance of various points of view. He lends a new perspective to tolerance by connecting tolerance to the elimination of violence and excessive suppression. His use of the term "excess" is critical, since he believes that all societies require a measure of suppression in order to function. While acknowledging that every society requires suppression, he also holds that every society reaches a point at which it exercises more suppression than is necessary to function. At this point suppression becomes "excess" or "surplus."[5]

After defining tolerance Marcuse attempts to define the practice of tolerance in current society. He finds it unfortunate that our society bestows tolerance even upon those actions which result in misery and suffering. If society tolerates such negative acts, it actually works against the principle of tolerance. In such cases tolerance functions directly to advance those acts which it seeks to prevent. Thus tolerance functions not to advance liberty and eradicate violence but to harbor and protect acts of violence and suppression of freedom.[6]

THE CONTROLLING FORCE OF AFFLUENCE

To comprehend Marcuse's view of a society devoid of true tolerance one must understand the controlling force of affluence. In _One-Dimensional Man_, Marcuse labels freedom from want as the "concrete substance of all freedoms."[7] Because contemporary society possesses the capability of fulfilling man's material needs, it has the concurrent capability of buying off its members from seeking further liberation. In Marcuse's view affluence enables society to coopt or buy off dissent. He believes that free speech operates freely only because society realizes that free speech is devoid of any real power of change; yet he acknowledges that society withdraws freedom of speech when it deems necessary. Moreover, society distributes free speech unequally with certain interests benefiting.

The Pleasure Principle

While Marcuse views technology, in _One-Dimensional Man_, as possessing inherently evil characteristics, in _Eros and Civilization_ he sees technology as a vehicle with which to liberate humanity to engage in erotic activities.[8] Technology thus has the capacity to liberate people for enjoyment rather than postponement of pleasure created by society's imperative to work.

Marcuse perceives the pleasure principle as fundamental in decision making. Human beings act on the basis of their desire for pleasure.[9] However, he acknowledges the limitations of this view, since pleasure alone is unable to sustain a community. To sustain a community its members must defer pleasure to perform functions that will insure their immediate and pressing needs. In cases where these interests conflict, they must act on the basis of the reality principle rather than the pleasure principle.

The Performance Principle

The specific form taken by the controlling reality principle is the performance principle.[10] Marcuse finds that the performance principle is most strongly manifested in a desire to perform work. He writes:

> The restrictions imposed upon the libido appear as more rational: the more universal they become, the more they permeate the whole of society. They operate on the individual as external objective laws and as an internalized force: the societal authority is absorbed into the "conscience" and into the unconscious of the individual and works on his own desire, morality, and fulfillment.[11]

In Marcuse's view an individual thus internalizes the repressiveness of society. This repression operates with dual power: it functions both as an external force on an individual and as part of his internal personality. In One-Dimensional Man, Marcuse argues that an individual requires no repression by agencies of the state because society has already shaped his instincts sufficiently to channel and direct needs in an appropriate direction.[12] Marcuse thus refuses to view the absence of restraint as freedom, for he believes that society has already shaped and molded the individual. He writes of this principle:

> A Society governed by the performance principle must impose such distribution (of pleasure into scattered moments of spare time) because the organism must be trained for its alienation at its very roots--the pleasure ego. It must learn to forget the claim for timeless and useless gratification, for the "eternity of pleasure." Moreover, from the working day, alienation and regimentation spread into free time. Such coordination does not have to be, and normally is not, reinforced from without by the agencies of society. The basic control of leisure is achieved by the length of the working day itself, by the tiresome and mechanical routine of alienated labor; these require that leisure be a passive relaxation and a recreation of energy of work.[13]

Possessed with such a work ethic, people abandon their desire for pleasure. They view both their bodies and minds as agents of production, profit, and consumption rather than vehicles for immediate pleasure and gratification. Marcuse thus reinterprets the Freudian evolution of human sexuality. He views this evolution as an artificial restriction by society to localize and limit sexuality to certain zones of the body, liberating the rest of the body for work.[14]

Material Needs

Marcuse's concept of the supremacy of the reality principle is intimately connected to the concept of material needs. He notes that if humans satisfy basic material needs, they possess little desire to modify social institutions. People perceive the society that fulfills as a good society; a society that provides these needs undermines ideals. Marcuse believes that ideals no longer represent unrealized possibilities or a critical attitude. As ideals diminish in power and status, our vision of social change ebbs and diminishes. As society meets the material needs of people, people lose their concern for ideals, and their behavior changes. Marcuse summarizes his position:

> I have just suggested that the concept of alienation seems to become questionable when the individuals identify themselves with my existence which is imposed upon them and have it in their own development and satisfaction. This identification is not illusion, but reality. However, the reality constitutes a more progressive stage of alienation. . . .
>
> Society compensates for our impotence by bestowing upon us the freedom to consume. . . . Freedom has become not the determining of one's life, but the passive consumption of goods and objects produced by those around us. . . .[15]

Marcuse views traditional civil liberties developing through the bourgeoisie's struggle for power. As long as the bourgeois class required civil liberties in order to assert power over society, those liberties possessed real significance; but now that the bourgeois class has won its battle, the traditional liberties have lost their importance.[16]

Marcuse thus views the failure to protest injustice, not as "moral or intellectual deterioration or corruption," but as "a rational technological attitude." With material wants satisfied people possess no need for freedom:

> A rising standard of living. . . .is an almost unavoidable by-

> product of the politically manipulated industrial society, once a certain level of backwardness has been overcome. The growing productivity of labor creates an increasing surplus-product which, whether privately or centrally appropriate and distributed, allows an increased consumption. As long as the constellation prevails, it reduces the use-value of freedom; there is no reason to insist on self-determination if the administered life is the comfortable and even the "good" life. This is the rational and material ground for the unification of opposites, for one-dimensional political behavior.[17]

The productivity of society tends to subvert the meaning of traditional civil rights. "Freedom from want," Marcuse states, "is not merely a necessary precondition, but is the concrete substance of all freedoms." With established freedoms no longer possessing much importance, Marcuse believes that "a comfortable, smooth, reasonable democratic unfreedom prevails in advanced industrial civilization."[18] He concludes elsewhere that society's "supreme promise is an ever-more comfortable life for an ever-growing number of people, who, in a strict sense, cannot imagine a qualitatively different universe of discourse and action, for the capacity to contain and manipulate subversive imagination and effort is an integral part of the given society."[19]

THE FUNCTION AND JUSTIFICATION OF FREEDOM OF SPEECH

Despite his cynicism Marcuse sets forth both positive and negative functions for freedom of speech within the society: "The exercise of political rights. . . in a society of total administration serves to strengthen this administration by testifying to the existence of democratic liberties which, in reality, have changed their content and lost their effectiveness."[20] In Marcuse's view, the facade or mask of opposition obscures the absence of any real opposing force.

Marcuse views American society as possessing only the deceptive appearance of freedom. University professors, politicians, and the media appear free, for society grants them permission to say anything within certain bounds. Since physical violence does not serve as a weapon of totalitarianism, no military forces work to threaten their right. However, the freedom that results is not genuine. While people may think and speak freely, they are restrained in their effort to change the basic structure of institutions. As individuals we practice a diluted version of freedom of thought and speech, but we must accept the class and institutional hierarchies and structures initiated and perpetuated by others.

While Marcuse criticizes freedom of speech, he still supports its maintenance:

> The existence and practice of these liberties remain a precondition for the restoration of their original oppositional function, provided that the effort to transcend their original (often self-imposed) limitations is intensified.[21]

Despite the fact that these political rights mislead the populace, he argues, they cannot be abandoned. Marcuse recognizes two options for those interested in liberation: (1) They can repress the corrupt elements in the society, though at present there exists no force capable of selective repression, or (2) they can await the end of the revolutionary process when the government deserving repression falls from power. He believes that the power to repress does not exist when it is actually needed -- that is, when those who hold power repress liberation.

Since Marcuse believes that we need liberties to carry out a revolution, he finds the espousal of repression imprudent. The call for repression merely places a tool in the hands of those who wield power. When corrupt forces are defeated through a revolutionary process, repression is superfluous. Marcuse thus recognizes that power cannot be withdrawn from certain groups, for those groups with the power to repress tolerance would not repress those from whom Marcuse wants to withdraw tolerance. Neither would they bestow tolerance on those whom Marcuse perceives to be for forces of liberation.

The Nature of Tolerance

Marcuse uses his analysis of the futility of repression to discuss the nature of tolerance of established policies. He holds that tolerance is extended largely to established attitudes; but he also believes that there exists an abstract tolerance of every position. The sciences are dominated by procedures, but on the periphery of each field rest certain practitioners or mavericks who initiate new actions and whom society pleasantly tolerates. Marcuse explains the nature of this tolerance:

> [Tolerance] is of two kinds: (1) the passive toleration of entrenched and established attitudes and ideas--even if their damaging effect on man and nature is evident; (2) the active official tolerance granted to the Right as well as to the Left, to movements of aggression as well as to movements of peace, to the party of hate as well as to that of humanity. I call this non-partisan tolerance "abstract" or "pure" inasmuch as it refrains from taking sides--but in doing so it actually protects the already established machinery of discrimination.[22]

Marcuse acknowledges that tolerance has never been defended in a way devoid of all value. When the principle of tolerance was formulated, liberals craved tolerance in order to acquire freedom from church and government. Liberal theory has already placed an important condition upon tolerance: it is to apply to human beings in the maturity of their faculties.[23]

Marcuse believes that if authentic tolerance were to be achieved, it would demand intolerance for what presently exists and tolerance for what is currently suppressed or labeled illegal. Tolerance, as currently practiced and defended, is actually repressive in its effects.[24]

Marcuse asserts that the system of constitutionally guaranteed civil rights and liberties rests on the underlying principle that "the established society is free and that any improvement, even a change in the social structure and social values, would come about in the normal course of events, prepared, defined, and tested in free and equal discussion, on the open marketplace of ideas and goods."[25] This belief assumes a system by which "different pressures, interests, and authoritie balance each other out and result in a truly general and national interest."[26] In practice, however, power remains unequally distributed. With both economic and political power concentrated in the hands of a few and with technology used as an "instrument of domination" effective dissent is thwarted.[27]

Our affluent democracy presents only a facade of tolerance. Our society permits the hearing of all points of view and treats with equal respect the intelligent and misinformed opinion, propaganda and education, truth and falsehood. However, the ability of the populace to distinguish right from wrong and good from bad and the capacity to deliberate and reach a decision, depends on its access to "authentic information" and that it can evaluate it on the basis of "autonomous thought." In Marcuse's view, the standard democratic defense for abstract tolerance "tends to be invalidated by the invalidation of the democratic process itself."[28]

Tolerance, as currently practiced, thus serves to nurture and reinforce repression. In Marcuse's view this perversion, gradual dehumanization, and development of "false consciousness" in individual members of society can be counteracted only through the blocking of "words and images which feed this consciousness." He thus sanctions censorship or precensorship of "regressive movements before they become active" on the grounds that this "withdrawal of tolerance" works to combat the more covert forms of censorship which permeate the "monopolistic media--themselves mere instruments of economic and political power."[29] Paradoxically Marcuse believes that these "anti-democratic" acts of censorship will ultimately function to create "the conditions where tolerance can again become a liberating and humanizing force."[30]

THE RELATIONSHIP BETWEEN TRUTH AND FREEDOM OF SPEECH

Marcuse poses a crucial question, which seeks to establish the relationship between truth and freedom of speech:

> Mill's often quoted words have a less familiar implication on which their meaning depends: the internal connection between liberty and truth. There is a sense in which truth is the end of liberty and liberty must be defined and confirmed by truth. In what sense can liberty be for the sake of truth? Liberty is self-determination, autonomy--this is almost a tautology, but a tautology which results from a whole series of synthetic judgements. It stipulates the ability to determine one's life: to be able to determine what to do and what not to do, what to suffer and what not.[31]

Marcuse is emphatic in asserting the certainty of knowledge and the ability of a reasonable human being to know the truth:

> Tolerance of free speech is the way of improvement, of progress in liberation, not because there is no objective truth, and improvement must necessarily be a compromise between a variety of opinions, but because there is an objective truth which can be discovered, ascertained only in learning and comprehending that which is and that which can be and ought to be done for the sake of improving the lot of mankind.[32]

This truth, however, must be discovered, not through intuition and insight, but through a delicate process of interpretation, evaluation, and synthesis. "It has to be uncovered by 'cutting through,' 'splitting,' 'breaking asunder' (dis-cutio) the given material--separating right and wrong, good and bad, correct and incorrect." Criticizing the "sacred liberalistic principle of equality for the 'other side,'" Marcuse asserts that there exist issues for which there is no "other side, for which the other side is 'regressive,' aggressive, or destructive in character and impedes possible improvement of the human condition."[34]

Marcuse appears to define freedom as freedom of choice. Yet he complicates his position by speaking about the distinction between real and apparent will: "But the subject of this autonomy is never the contingent private individual as that which actually is or happens to be. It is rather the individual as human being who is capable of being free with others."[35] He thus unites the dual notions of self-determination and self-perfection:

> The problem of making possible such harmony between every individual liberty and the other is not that of finding a compromise between competitiveness and between freedom and law, between general and individual interest, common and private welfare in an established society, but of creating the society in which man is no longer enslaved by institutions which vitiate self-determination from the beginning. In other words, freedom is still to be created even for the freest of the existing societies. And the direction in which it must be sought and the institutionalized and cultural changes which help to attain the goal are at least in developed civilizations comprehensible --that is to say, they can be identified and projected on the basis of experience by human reason.[36]

Marcuse argues that we can recognize the possibilities of our own fulfillment. He argues that self-determination and self-perfection are interdependent and that self-determination necessitates self-perfection. Having asserted the connection between self-perfection and self-determination, he discusses the implications of this relationship. First he implies the necessity for choices and alternatives. He believes that for self-determination to exist genuine options must also exist. However, there are limitations to this position. Society cannot permit any one individual to make a free choice among alternatives. One individual choice may preclude another from retaining the option to choose. This limitation is further reinforced by the fact that every society both controls the availability of some alternatives and deliberately advances other alternatives.[37]

Marcuse asserts that for a person to choose well he requires, not merely alternatives, but an awareness and consciousness of alternatives. Marcuse recognizes that just as all things cannot be real, an individual cannot know all things. An individual's awareness must possess some ordering. Yet Marcuse recognizes that even such an ordering is difficult, for society itself chooses to cultivate an awareness of certain alternatives while at the same time obscuring an awareness of other alternatives through its programs of education, through the media, and through the total socialization process. Society cultivates specific skills and motivations within the individual. In such an environment Marcuse believes that freedom achieves self-determination only when it incorporates the concept of self-perfection. Freedom thus involves both the ordering of alternatives and the power to actualize those alternatives.

The Limits of Tolerance

Having established a background on the dimensions of the concept of freedom and its functions, Marcuse advances his case for freedom of thought. Though failing to distinguish between thought and action, he argues that freedom of thought, although not unlimited, is necessary for a society to function.

> Tolerance cannot be indiscriminate and equal with respect to the contents of expression, neither in word nor in deed; it cannot protect false words and wrong deeds which demonstrate that they contradict the possibilities of liberation. Such indiscriminate tolerance is justified in harmless debates, in conversation, in academic discussion: it is indispensable in the scientific enterprise, in private religion. But society cannot be indiscriminate where the pacification of existence, where freedom and happiness themselves are at stake. Here certain policies cannot be proposed. Certain behavior cannot be permitted without making tolerance an instrument for the continuation of servitude.[38]

Throughout Marcuse develops a series of standards for the practice of tolerance. Often he contradicts himself. While labeling tolerance as "indispensable" in scientific enterprises he nevertheless states that the restoration of freedom would in many cases demand in intolerance "toward scientific research in the interest of deadly 'deterrents' of abnormal human endurance under inhuman conditions."[39] He does, however, discuss the necessity of strict regulations governing the curriculum of educational institutions. At the same time he acknowledges that withdrawal of tolerance toward regressive, repressive opinions could result only from extensive pressure and a reversal of current trends.

Marcuse appears less optimistic when he discusses the likelihood of withdrawal of tolerance for the repressive practices of businesses and publicity. Such practices "pertain to the basis on which the repressive affluent society rests and reproduces itself and its vital defenses."[40]

Marcuse urges a reconsideration of the extension of tolerance to certain acts of violence. He asserts the 'natural right' for oppressed minorities to use extralegal means.[41] In most cases his principle of liberating tolerance implies intolerance of rightist movements and tolerance of the left. He labels the entire post-Fascist, post-Nazi period as one of "clear and present danger." He urges existing society to shun the precedent of Nazi Germany, where propaganda quickly evolved into action. Instead society must achieve pacification and liberation through the withdrawal of tolerance before the deed when communication is still in the realm of word, print, and picture. Maintaining that this is an "emergency situation" and a "society of extreme danger," Marcuse dismisses the standard liberal defense of free speech: "Different opinions and philosophies can no longer compete peacefully for adherence and persuasion on rational grounds; the 'marketplace of ideas' is organized and delimited by those who determine the national and individual interest."[42] Only by "breaking the tyranny of public opinion and its makers in the closed society" will there develop individuals with mature faculties, capable of rational and independent thought, desirous of participation in dialogue and discussion, capable of making decisions about tolerance.[43]

Despite the specific conditions Marcuse constructs for the limitation of tolerance he insists that "there is an objective truth" that can be revealed by "'cutting through,' 'splitting,' 'breaking asunder,' the given material." He acknowledges the existence of "incorrect arguments" but suggests that there is a specific process of separating right from wrong arguments. However, in his concluding remarks, he acknowledges the difficulties of this process and thus comes out on the side of unlimited tolerance. At the same time he recognizes that true freedom does not really exist.

To develop his concept of the absence of true freedom Marcuse asserts that a complete sifting of right from wrong arguments can rarely occur, for even objectivity is prejudiced. He offers an example of such prejudiced objectivity:

> When a magazine prints side by side a negative and a positive report on the FBI, it fulfills honestly the requirements of objectivity. However, the chances are that the positive wins because the image of the institution is deeply engraced in the mind of the people.[44]

In Marcuse's view, even when the media realize their neutrality, they rarely maintain that neutrality in their impact on the public mind. To Marcuse such neutrality tends to benefit the existing system. It aids the system by divesting the moral dimension of its power. Though adherence to the principle of neutrality presumes that there exist valid points worthy of presentation on both sides of the issues, nothing in fact is actually presented. The harm in the absence of a two-sided presentation is exacerbated by the non-neutrality of the persons being addressed. Controlled and manipulated by the society, the auditors have relinquished their neutrality. Marcuse makes this point in a concluding passage:

> The people exposed to this impartiality are no tabulae rasae; they are indoctrinated by the conditions under which they live and think and which they try to transcend. To enable them to become autonomous to find by themselves what is true and what is false for man in the existing society, they would have to be freed from the prevailing indoctrination (which is no longer recognized as indoctrination). But this means the trend would have to be reversed: They would have to get information slanted in the opposite direction. For the facts are never given immediately and never accessible immediately; they are established; "mediated" by those who make them; the truth "the whole truth" surpasses these facts and requires rupture with their appearance.[45]

Marcuse thus suggests that for freedom to exist there must also be a rupture between facts and reality. While such a rupture is impossible within the existing society as Marcuse views it, he views unlimited tolerance as serving to enhance the probability of the all-encompassing liberation to which he refers.

Marcuse explores the process by which freedom biased in favor of particular groups is to be converted to freedom available to all citizens. Using Freud as a foundation, he suggests that the social structure is introjected into the individual. He suggests that a biological foundation for revolution will evolve. New needs will evolve to become an inherent part of an individual's personality so that failure to satisfy them will disconcert the individual. These new needs will require satisfaction as strongly as those needs currently viewed as simply biological. Thus, a revolution, in Marcuse's view, would change not only those who control social institutions, but also those who carry out the revolution. Since the culture is introjected into us and pervades the organism, we must engender and make the revolution not only against the society but, more importantly, against ourselves:[46]

We would have to conclude that liberation would mean subversion

> against the will and against the prevailing interests of the great majority of people. In this deep-rooted, "organic" adaptation of the people to a terrible, but profitably functioning society, lie the limits of democratic persuasion and evolution. On the overcoming of these limits lies the establishment of democracy.[47]

Footnotes

[1] Herbert Marcuse, An Essay on Liberation (Boston: Beacon Press, 1969), 81-82. For a contrasting view see Eliseo Vivas, Contra Marcuse (New Rochelle, New York: Arlington House, 1971), 171-177. For a complete bibliography of Marcuse's writings see Kurt Wolff and Barrington Moore, Jr., eds., The Critical Spirit: Essays in Honor of Herbert Marcuse (Boston: Beacon Press, 1967), 427-433.

[2] See Mortimer Adler, The Idea of Freedom (2 vols.; Chicago: Encyclopedia Britannica, 1958-61).

[3] Thomas Hobbes, Leviathan, Vol. XXIII of Great Books of the Western World, ed. by Mortimer Adler and William Garman (54 vols.; Chicago: Encyclopedia Britannica, 1938-52), 86-113; John Locke, An Essay Concerning Human Understanding, Vol. XXXV of Great Books of the Western World, 85. See also Bertrand Russell, "Freedom in Society," in Sceptical Essays (London: George Allen & Unwin, 1952), 169; Harold Laski, Liberty in the Modern State (Harmondsworth, Middlesex: Penguin Books, 1937), 49.

[4] For a discussion of Plato's theory of freedom, see Joyce Flory, "Philosophical Assumptions Underlying Plato's Theory of Freedom of Speech," in Free Speech Yearbook, 1974 (New York: Speech Communication Association, 1974), 45-53; Plato, The Republic, Vol. VII of Great Books of the Western World, 411-412; Auguste Hegel, The Philosophy of Right, Vol. XLVI of Great Books, 16.

[5] Marcuse, An Essay on Liberation, 82; Herbert Marcuse, "Repressive Tolerance," in A Critique of Pure Tolerance (Boston: Beacon Press, 1967), 102-103.

[6] Marcuse, Eros and Civilization (Boston: Beacon Press, 1955), 35-37, 155; Alasdair MacIntyre, Herbert Marcuse (New York: Viking Press, 1970), 47-49, 57.

[7] Marcuse, One-Dimensional Man (Boston: Beacon Press, 1964), 5; Essay on Liberation, 82; Macintyre, 77, 102-104.

[8] Paul A. Robinson, The Freudian Left (New York: Harper and Row, 1969), 236.

[9] Eros and Civilization, 15, 60; Robinson, 203; Macintyre, 55; Vivas, 139-161. For a more-extensive discussion of Marcuse's view of pleasure, see Herbert Marcuse, "On Hedonism," in Negations: Essays in Critical Theory, trans. by Jeremy Shapiro (Boston: Beacon Press, 1968).

[10] Eros and Civilization, 46-48, 124, 155; Robinson, 202-205.

[11] Eros and Civilization, 46.

[12] Macintyre, 47-49.

[13] Eros and Civilization, 47.

[14] Eros and Civilization, 38-48; Robinson, 206-207.

[15] One-Dimensional Man, 11; Macintyre, 73-74; Robinson, 204,242.

[16] Essay on Liberation, 85-87.

[17] One-Dimensional Man, 49-50.

[18] One-Dimensional Man, 11.

[19] One-Dimensional Man, 23.

[20] Essay on Liberation, 84.

[21] Essay on Liberation, 85.

[22] Essay on Liberation, 85; Robinson, 242-243; Macintyre, 21-26; Vivas, 39-40. For more specifics on Marcuse's view of revolution, see Herbert Marcuse, Reason and Revolution (Boston: Beacon Press, 1960).

[23] Essay on Liberation, 86.

[24] Haig A. Bosmajian, ed., The Principles and Practice of Freedom of Speech (Boston: Houghton Mifflin, 1971), 348.

[25] Bosmajian, 355.

[26] Bosmajian, 355.

[27] Bosmajian, 366.

[28] Bosmajian, 356.

[29] Bosmajian, 366.

[30] Bosmajian, 366.

[31] Essay on Liberation, 86.

[32] Essay on Liberation, 89.

[33] Essay on Liberation, 90.

[34] Bosmajian, 371.

[35] Essay on Liberation, 87.

[36] Essay on Liberation, 87.

[37] For an opposing view of society see Vivas, 45-59, 211, 181-197, 244-230.

[38] Essay on Liberation, 88.

[39] Bosmajian, 360.

[40] Bosmajian, 360.

[41] Bosmajian, 361, 369.

[42] Bosmajian, 365.

[43] Bosmajian, 363.

[44] Essay on Liberation, 90.

[45] Essay on Liberation, 98-99.

[46] Robinson, 242-243.

[47] Essay on Liberation, 17.

THE SUPREME COURT AND THE FIRST AMENDMENT: 1976-1977

William A. Linsley
University of Houston

I. The Reach Is Extended

In general in 1976-1977 the Supreme Court justices came across to those who examine Court trends as possessed of a mixture of philosophies ranging from judicial activism to the avoidance of social issues more suited to political arenas. Nevertheless, the most predictable elements of the Burger Court were continued: limited access to federal courts; narrow interpretation of the rights of criminal defendants; and limitations on the power of federal courts to entertain challenges to the constitutionality of state laws or proceedings in civil cases. The conservative mood of the Burger Court still was to be found in major setbacks handed women's-rights advocates and civil-rights groups attempting to combat racial discrimination.

The chairman of the board of directors of the American Civil Liberties Union declined to label the term as an unqualified disaster but found the Court's defense of individual rights inadequate. However, the Burger Court in certain areas continued a previously established liberal thrust by extending constitutional protections to aliens, illegitimate children, and lawyers. Civil-liberties advocates found satisfaction in some decisions, most notably in the area of the First Amendment; for the Court, among other decisions, ruled that lawyers may not be barred from advertising the availability and price of routine legal services (Bates v. State Bar of Arizona*). Of the 176 cases heard by the Court during the 1976-1977 term, fourteen opinions responded directly to issues that necessitated interpreting the reach of the First Amendment. Among these the Court held:

1. A television news clip can constitute unlawful appropriation of professional property rights. The defense that television enjoys the protected right to publicize legitimate news events did not overcome the commercial stake of a performer (Zacchini v. Scripps Howard).

2. When weighed against freedom to communicate and associate, the reasonable necessities of prison management prevail, and loss of First Amendment rights becomes consonant with the restrictive circumstances of incarceration (Jones v. North Carolina Prisoners' Labor Union).

3. The advertising of contraceptive products should not be prohibited because some may find it offensive (Carey v. Population Services International).

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*Case citations for the 1976-1977 Supreme Court term do not appear in this article because they are not assigned until a time subsequent to the preparation of this material.

4. An individual cannot be required to display on private property an ideological message for the purpose that it be publicly observed and read (*Wooley v. Maynard*).

5. An ordinance that restricts one method of communicating to the public does not avoid violating the First Amendment by the claim that other communication channels are left open (*Linmark v. Willingboro*).

6. Teachers cannot be required, as a condition of their employment to monetarily support ideological causes regardless of any governmental justification (*Abood v. Detroit Board of Education*).

7. Teachers do not forfeit the rights enjoyed by concerned citizens when they comment on matters pertaining to the operation of public schools (*City of Madison v. Wisconsin Employment Relations Commission*).

8. A nontenured teacher initially must assume the burden of proving that he engaged in conduct protected by the First Amendment and that this conduct was a "substantial factor" that motivated the decision against his reappointment (*Mt. Healthy v. Doyle*).

9. Contemporary community and patent-offensiveness standards are questions of fact for jury determination and not for conclusive definition by state statute (*Smith v. U.S.*).

10. A state obscenity statute is not unconstitutionally vague for failure to specifically define offensive depictions of sexual conduct, since good intentions can be imputed to enable belief that a state desired to comply with the *Miller* case standards (*Ward v. Illinois*).

Throughout the 1976-1977 term the voting patterns of the Court appeared less certain than a year ago. Justices Burger and Rehnquist remain furthest to the right and often vote together. Justices Marshall and Brennan continue voting together in support of the most liberal position. Between these extremes the five other justices scatter widely. Justice Blackmun on occasion abandons the Burger-Rehnquist view. Last year the newest justice John Paul Stevens had yet to establish a First Amendment voting pattern; but this term his dissents, particularly in obscenity cases, show independence from Burger Court thinking.

The Supreme Court for two decades has tried to design an obscenity standard that would enable prosecution of pornography peddlers but avoid conflict with First Amendment guaranties of free expression. Standards advanced by the 1973 case of *Miller v. California*, 413 *U.S.* 15, encouraged local juries to convict under state obscenity laws if the "average person, applying contemporary community standards," would consider material patently offensive and lacking serious literary, artistic, political, or scientific value. In 1973 the Court has held that no one would be prosecuted unless the challenged material was specifically identified in the state law. However, on June 9, 1977, the Court upheld the conviction of an Illinois man (*Ward v. Illinois*) for selling sado-masochistic material not found on the state's forbidden list. Justice Stevens claimed that the court violated its promise and weakened the rigidity of its *Miller*-case requirements. He saw this as a withdrawal of the cornerstone of the *Miller* case and thus a promising development.

II. Opinions Rendered

Criminal Law

Wooley et al. v. Maynard (45 LW 4379)

New Hampshire law requires noncommercial motor vehicles to display license plates bearing the state motto: "Live Free or Die" and makes it a misdemeanor to obscure the motto. Maynard and his wife, Jehovah's Witnesses, regarded the motto as repugnant to their moral, religious, and political beliefs and obscured it from view on the license plates of their family automobiles. Maynard was sentenced to and served fifteen days in jail for the misdemeanor offense and for refusing to pay the imposed fines. Subsequently a Federal District Court enjoined New Hampshire from again arresting and prosecuting Maynard for obscuring his license-plate motto. The Supreme Court affirmed the District Court, Justices White, Blackmun, and Rehnquist dissenting in whole or in part.

Chief Justice Burger took the position that New Hampshire may not constitutionally require display on private property of an ideological message for the purpose that it be publicly observed and read. Freedom of thought as protected by the First Amendment against state action includes, according to the Court majority, both the right to speak freely and the right to refrain from speaking at all. Forcing an individual, as part of daily life, to advocate public adherence to an ideological point of view "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control" (West Virginia v. Barnette, 319 U.S. 624, 642). Burger rejected the state's claimed need to display the motto so as to identify vehicles and to promote an appreciation of history, individualism, and state pride as not sufficiently compelling to outweigh Maynard's First Amendment right to avoid becoming the courier for the state's ideological message.

Justice Rehnquist, joined by Justice Blackmun, dissented by claiming that Maynard was not forced to affirm or reject the motto but simply required to display a state auto-license tag for identification and registration purposes. Rehnquist and Blackmun found no affirmation of belief in the display of license tags and compared the situation to an atheist who carries and uses U.S. coins without any belief in the motto "In God We Trust."

Municipalities

Linmark v. Township of Willingboro (45 LW 4441)

The question presented by this case was "whether the First Amendment permits a municipality to prohibit the posting of 'For Sale' or 'Sold' signs when the municipality acts to stem what it perceives as the flight of white home owners from a racially integrated community."

Justice Marshall delivered the Court's opinion, in which all justices except Rehnquist joined. The Court reversed the lower court by finding the Willingboro ordinance prohibiting posting to be in violation of the First Amendment.

Marshall rejected the claim that the ordinance did not conflict with the First Amendment because it restricts only one method of communication while leaving open ample communication channels. The alternatives--newspaper advertising and listing with realtors--were regarded as more costly, less autonomous than the use of signs, and less likely to reach persons not "deliberately" seeking sales information. Marshall noted that the ordinance prohibits signs based on their content out of fear that those who receive the information will act on it. Had the ordinance proscribed the place of signs (front lawns) or the manner of the speech (signs) which might be "related to aesthetic values and unrelated to the suppression of free expression," the case could have become a legitimate regulation of the "time, place and manner" of communication previously supported by the Court.

Since the ordinance was not needed to achieve stable, integrated housing, the ordinance could not be upheld for promoting an important governmental objective. Marshall concluded that Willingboro was, by this decision, not left defenseless to promote integrated housing. The township can create inducements to retain home owners or through "Not for Sale" signs widely publicize a community spirit to cause whites to remain.

This case applies the First Amendment in a way that extends the free flow of commercial information as a societal interest set forth by the Court in Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976).

Schools

Mt. Healthy City School District v. Doyle (45 LW 4079)

Doyle, an untenured teacher, argued with cafeteria employees about food service, swore at students, and made obscene gestures to girls. A local radio station announced the adoption of a dress code for teachers after receiving a report by telephone from this teacher. The school board declined to rehire Doyle, citing lack of tact in handling professional matters with specific reference to the radio station and obscene-gesture incidents. Doyle sued for reinstatement, claiming violation of his First Amendment rights.

The District Court declared the telephone call "clearly protected by the First Amendment." Since the school board had made it a "substantial part" of the decision to terminate Doyle, he was entitled to reinstatement. The Court of Appeals affirmed.

Justice Rehnquist delivered the opinion for a unanimous Court. He contended that even though conduct protected by the First Amendment played a substantial part in the decision not to rehire Doyle, this did not amount to a violation of his constitutional rights. Rehnquist reasoned that, in a decision not to rehire, an employee should not enjoy a better position resulting from the exercise of constitutionally protected conduct if such benefit would not exist if he had done nothing. Any constitutional principle is still protected if the employee is placed in no worse position than if he had not engaged in the conduct.

A proper test, according to Rehnquist, protects constitutional rights without producing unnecessary consequences not essential to the assurance of those rights. Since it appeared that the protected conduct may have made the board more certain of the correctness of a decision it would have reached anyway, the case was remanded to the lower court to determine how, in fact, the board would have acted in the absence of the protected conduct.

City of Madison v. Wisconsin Employment Relations Commission (45 LW 4043)

During an open meeting of the Board of Education discussion focused on pending labor negotiations between the board and the teachers' union. one nonunion teacher, over union objection, asked for postponement of a "fair share" clause (all teachers, union or not, would pay union dues) until an impartial committee could give it closer examination. Later the union filed a complaint that the board violated state law by permitting the nonunion teacher to speak. This speech, the union claimed, constituted negotiations by the board with a member of the bargaining unit other than the exclusive collective-bargaining representative.

The state employment-relations commission found the board in violation of a prohibited labor practice and ordered it to prohibit any employees other than union officials from speaking at board meetings on matters subject to collective bargaining. The state supreme court upheld the commission and took the position that abridgment of speech was necessary "to avoid the dangers attendant upon relative chaos in labor-management relations" (69 Wis. 2d 212).

The question on appeal was whether a state may require an elected board of education to prohibit teachers from speaking in an open meeting when they address the subject of pending collective-bargaining negotiations.

Justice Burger delivered the opinion of a unanimous Court which reversed the state supreme court by holding that teachers are not merely employees but also concerned citizens and that they may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public school": Pickering v. Board of Education, 391 U.S. 563 (1968). Although a public body may deal with specific subject matter and may transact business at nonpublic sessions, the "discussion of public business cannot be confined to one category of interested individuals." Burger concluded: "When the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment or the content of their speech." Since virtually any subject could be a potential subject for collective bargaining, an order prohibiting speech "on matters subject to collective bargaining" constitutes the essence of prior restraint and a serious impairment of a board's ability to govern a district.

Abood v. Detroit Board of Education (45 LW 4473)

A Michigan statute permits governmental employees to be represented by a union. Under an authorized agency shop arrangement even nonunion members represented by the union must pay to the union a service charge equal in amount to union dues. Certain teachers brought suit against the Detroit Board of Education and the union representing teachers employed by the board to be relieved of paying compulsory dues to a union engaged in political and ideological activities of which the teachers did not approve and which were not collective-bargaining activities. The teachers sought to have the agency-shop clause declared invalid as a deprivation of free association protected by the Constitution. The Michigan Court of Appeals upheld the constitutionality of the agency-shop clause and further held that since the teachers did not allege that they notified the union of the activities they opposed they were not entitled to restitution of any service charges that might result from union application of money to non-collective-bargaining purposes in violation of First and Fourteenth Amendment rights.

With five justices filing concurring opinions a unanimous Supreme Court vacated the judgment of the Michigan Court of Appeals. The Court held that public employees are free to express themselves about and participate in political and ideological activities open to other citizens, but the differences as to collective bargaining between the public and the private sectors do not grant any greater right for public employees to avoid contributing to the costs of union representation. The Court acknowledged that the First Amendment frees an individual to believe as he will, his beliefs being shaped by his mind and conscience rather than coerced by the state. The teachers, consequently, could not be required to contribute, as a condition of their employment, toward support of ideological causes they oppose. But the Court also decided that compelling an employee to finance union activity related in some way to collective bargaining is permissible under the First Amendment because such compulsion is "relevant or appropriate" to asserted governmental interests.

Chief Justice Burger, in a concurring opinion, noted that the Court for the first time in a First Amendment case reversed the principle that "when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests." Under this case, Burder held, a nonunion employee who would exercise his First Amendment rights must prove that the union financed "ideological activities unrelated to collective-bargaining." Burger would require the state, consistent with established First Amendment principles, to "demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives."

Obscenity

Jerry Lee Smith v. U.S. (45 LW 4495)

The defendant, who was indicted for mailing obscene materials in violation of a federal law, unsuccessfully sought to question jurors on their knowledge of contemporary community standards with regard to the depiction of sex and nudity. He unsuccessfully sought a directed verdict of acquittal because the Iowa obscenity statute in effect at the time of his conduct prohibited only the dissemination of obscene material to minors and the prosecution failed to prove that he had violated that standard. The Court of Appeals affirmed the defendant's conviction, holding his questions to the jury improper because they concerned the ultimate question of guilt or innocence rather than juror qualifications and because the offense to contemporary community standards was a federal question, not to be decided on the basis of state obscenity law. The principal issue certified to the Supreme Court was "whether the jury is entitled to rely on its own knowledge of community standards, or whether a state legislature (or a smaller legislative body) may declare what the community standards shall be; and, if such a declaration has been made, whether it is binding in a federal prosecution."

Justice Blackmun delivered the opinion for the majority, Justices Brennan, Stewart, Marshall, and Stevens dissenting. Blackmun argued that the limited application of the Iowa statute did not exonerate the defendant, because state law cannot define contemporary community and patent offensiveness standards as established in Miller v. California, 413 U.S. 15. These are fact questions to be judged in federal prosecutions by the jury's understanding of contemporary community standards. The holding that the Iowa statute is not conclusive on the issue of contemporary community standards does not void state law and still renders it admissible into evidence as an indication "of the mores of the community whose legislative body enacted the law." Blackmun concluded (1) that the lower court properly refused to allow questions to jurors about their understanding of community standards and (2) the federal law (18 U.S.C. Sect. 1461) was not vague, since conduct described by the statute was sufficiently ascertainable that due process could be assured.

Justice Brennan, Stewart, and Marshall dissented. They claimed that the federal statute under which the defendant was convicted is "clearly overbroad and unconstitutional on its face." Justice Stevens, in a lengthy dissent, contended that "the free market place of ideas" and not the courts should distinguish the useful and beautiful from the ugly and worthless. He found that "the petitioner's communications were intended to offend no one" and proved offensive only to third parties who were not intended to see them. Stevens found no basis for criminal prosecution.

Stanley Marks et al., v. U.S. (45 LW 3233)

Marks was charged with transporting obscene materials in interstate commerce in violation of a federal statute. Marks' action occurred when the Memoirs test, 383 U.S. 413 (1966), was in effect. This test held that expressive material is constitutionally protected unless "utterly without redeeming social value." However, after Marks was charged, but before trial, reference to the Miller case, 413 U.S. 15 (1973), resulted in a new test "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The District Court instructed the jury under the Miller test. Marks argued that the retroactive application of the Miller test punishes conduct innocent under the Memoirs test, that this violates the Constitution's ban on ex post facto laws. Nevertheless, Marks was convicted by a jury instructed under the Miller test, and the circuit court affirmed.

Justice Powell delivered the Court's opinion, from which Brennan, Stewart, Marshall, and Stevens dissented in part. In reversing the lower courts Powell noted that the Miller test marked a significant departure from Memoirs and clearly expanded criminal liability. Conduct that would have gone unpunished under Memoirs was intended to result in conviction under Miller. Powell contended that the due-process clause precludes application to Marks of standards announced in Miller v. California "to the extent that those standards may impose criminal liability for conduct not punishable under Memoirs." The lower court is obligated to instruct the jury to acquit unless the materials in question are "utterly without redeeming social value." Powell concluded, however, by reaffirming Hamling v. United States, 418 U.S. 102, that "any constitutional principle enunciated in Miller which would serve to benefit petitioners must be applied in their case."

While Justice Stevens joined in the Court's opinion, he was unable to support its judgment. He noted that his experience on the Court, although brief, had persuaded him "that grossly disparate treatment of similar offenders is a characteristic of the criminal enforcement of obscenity law," making even-handed enforcement of the law a virtual impossibility. Stevens' brief dissent lamented the illogical premises and intolerably vague nature of obscenity laws.

Splawn v. California (45 *LW* 4574)

Splawn was convicted for selling obscene film in violation of a California law. Splawn contended that the instructions to the jury (1) violated his First Amendment rights by allowing the jury to convict him even though it might have found the film protected under the standards announced in *Miller v. California* 413 *U.S.* 15 (1973) and (2) violated the prohibition against *ex post facto* laws and the fair-warning requirement of *Bowie v. California*, 378 *U.S.* 347. Splawn challenged those instructions which permitted the jury, in determining whether the film was utterly without redeeming social importance, to consider the circumstances of the sale and distribution, particularly whether such circumstances indicated that the film was being commercially exploited for the sake of its prurient appeal.

The Supreme Court, by a 5-4 vote, upheld Splawn's conviction. Justice Rehnquist, joined by Burger, White, Blackmun, and Powell, held that the instructions to the jury violated no First Amendment rights. Rehnquist found the circumstances of distribution relevant to whether offensive aspects of the material were forced upon the public and whether social importance claimed for the material in the courtroom was the real basis on which it was sold or a spurious claim for litigation purposes.

Although the California law that authorized the instruction Splawn challenged was enacted after part of the conduct for which Splawn was convicted but prior to his trial, Rehnquist held that no new substantive offense was created. The new law merely specified the type of evidence a jury may consider in deciding whether allegedly obscene material was "utterly without redeeming social importance." There was no change in the interpretation of the elements of the offense prohibited by California law, and *Bowie* was inapplicable.

In a dissent filed by Justice Stevens and joined in by Justices Brennan, Stewart, and Marshall, Stevens admitted that Splawn's statements in marketing the film made "it clear that the films were 'sexually provocative,' but that is hardly a confession that they were obscene." If they were not otherwise obscene, Stevens could not understand how the films "lost their protected status by being truthfully described." Stevens concluded that "under any sensible regulatory scheme, truthful description of subject matter that is pleasing to some and offensive to others ought to be encouraged, not punished." Stevens would not send Splawn to jail "for telling the truth about his shabby business."

Ward v. Illinois (45 *LW* 4623)

Ward was convicted of selling obscene, sado-machochist materials in violation of an Illinois obscenity statute. The conviction was affirmed by the Illinois Supreme Court after standards were announced by the U.S. Supreme Court in *Miller v. California*, 413 *U.S.* 15. Ward made four claims: (1) The Illinois law is unconstitutionally vague because it failed to give him notice of the kinds of materials which could not be sold legally in the state, and this violated the *Miller* requirement that sexual conduct that may not be depicted in a patently offensive way must be specifically defined by applicable state law. (2) The materials in question are not examples of patently offensive depictions as defined in the *Miller* case. (3) The materials are not obscene under the three-part *Miller* test. (4) Illinois failed to conform to the *Miller* requirements even if the Illinois law was not too vague. The Supreme Court affirmed the conviction of Ward by finding the Illinois obscenity statute sufficiently valid to substantiate a conviction even when interpreted in light of the *Miller* requirements.

Justice White delivered the opinion of a divided court, Justices Brennan, Stewart, Stevens, and Marshall dissenting. White addressed himself to each of Ward's claims: (1) Ward had ample guidance from the Illinois Supreme Court that his conduct did not conform to Illinois law because similar materials had been held to violate the Illinois statute before his conduct. (2) The examples of improper sexual representations set forth in the Miller case were not intended to be exhaustive, and certainly the Miller decision did not intend to extend constitutional protection to materials that Ward was selling. (3) The Illinois statute conforms to the Miller test except that it retains the stricter "redeeming social value" factor. (4) To decide that the Illinois court did not intend to adopt the Miller examples is to reach the untenable conclusion that the Illinois supreme court "chose to create a fatal flaw" by ignoring the specificity requirement set down in Miller.

Justice Stevens, in his dissent, charged that the Court has now abandoned one of the cornerstones of the Miller test: namely, that no one is to be prosecuted for the sale or exposure of obscene materials unless these materials depict sexual conduct specifically defined by state law. Illinois, according to Stevens, gave little more than lip service to the specificity requirement in Miller. Stevens concluded that "one of the strongest arguments against regulating obscenity through criminal law is the inherent vagueness of the obscenity concept. The specificity requirement as described in Miller held out the promise of a principled effort to respond to that argument. By abandoning that effort today the Court withdraws the cornerstone of the Miller structure and, undoubtedly, hastens its ultimate downfall."

Advertising

Carey v. Population Services International (45 LW 4601)

A North Carolina corporation which made mail-order sales of nonmedical contraceptive devices regularly advertised its products in New York periodicals and filled mail orders from New York residents without regard to their age. The state of New York brought action against the corporation under a New York law forbidding anyone to advertise contraceptives. New York contended that advertisement of contraceptive products was offensive and embarrassing to those exposed to the ads and that their continuation would legitimize sexual activity among young people. The lower courts found for the corporation. In a complex opinion, based only in part on First Amendment considerations, the Supreme Court affirmed.

With Justices Burger and Rehnquist dissenting the Court held that New York's claims failed to justify the suppression of expression legitimately protected by the First Amendment. Where obscenity is not involved, the Court noted that it has consistently held that the fact that protected speech may be offensive to some does not justify its suppression. The Court found none of the advertisements even remotely "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action. They merely state the availability of products and services that are not only entirely legal but constitutionally protected."

Justice Rehnquist's dissent implied that the founding fathers would not have conceived that their Bill of Rights might be used to protect promotional means for contraceptive devices. Rehnquist opposed the Court's interference with the exercise of state police power designed to protect the morality of its minors.

Bates v. State Bar of Arizona (45 LW 4895)

Two Arizona attorneys were charged by the Arizona State Bar Association with violation of a disciplinary rule prohibiting attorneys from advertising in newspapers or other media. The attorneys had placed an ad in a Phoenix newspaper publicizing their "legal clinic" which offered "legal services at very reasonable fees" and listed fees for uncontested adoptions, simple personal bankruptcies, and changes of name. The lower court held that the no-advertising disciplinary rule had been violated.

The Supreme Court renewed its position taken in Virginia Pharmacy Board v. Virginia Citizens Coucil, 425 U.S. 748 (1976). Like the statutes in Virginia the Arizona disciplinary rule was found to inhibit "the free flow of commercial information and to keep the public in ignorance." Again commercial speech serving individual and societal interests assuring informed and reliable decision making was granted First Amendment protection. The Court rejected arguments that lawyers are above "trade" and that advertisement of fees will undermine true professionalism. Routine services, the majority held, lend themselves to advertising that is not inherently misleading.

The Court contended that although "advertising does not provide a complete foundation on which to select an attorney, it would be peculiar to deny the consumer at least some of the relevant information needed for an informed decision on the ground that the information was not complete."

The constitutional issue in this case was limited to whether the state may prevent newspaper publication of a truthful advertisement concerning the availability and terms of routine legal services. The judgment, which pertained to no other profession, found the disciplinary rule violative of the First Amendment for restraining the information people need if they are to be sufficiently informed so that they might act in their own best interests.

Justice Rehnquist dissented because of his belief that the First Amendment is demeaned when used to protect the advertisement of goods or services. He declined to take one step further down the "slippery slope" leading away from commercial speech as unprotected speech.

Prisoners

Jones v. North Carolina Prisoners' Labor Union (45 LW 4820)

A prisoners' union alleged that the North Carolina Department of Correction violated First Amendment rights of the union and its members when inmates were prohibited from soliciting other inmates to join the union, when union meetings were barred, and when bulk mailing of union publications was denied distribution among prisoners. The union further claimed a deprivation of equal protection of the laws in that the Jaycees and Alcoholics Anonymous were permitted to have meetings and other organizational rights, including bulk-mailing privileges. The union sought and was granted injunctive relief against these restrictive policies. The lower court took note of the department's arguments that the union will constitute a threat to discipline and control and that it could result in "undesirable concerted activity" but concluded that it had no conviction that an association of inmates is good or bad. Since union membership was permitted, solicitation activity had to be allowed; and as bulk-mailing privileges had been extended to others, the prison administration "may not pick and choose, depending on their approval or disapproval of the message or purpose of the group."

Justice Rehnquist delivered the opinion, from which Justices Marshall and Brennan dissented. Rehnquist, who reversed the lower court, held that the lower court failed to give appropriate recognition to the restrictive circumstances of penal confinement. He cited the Court's position in Pell v. Procunier, 417 U.S. 822 (1974) that "challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system." Group activity or solicitation therefore would, he concluded, cause friction in the operation of penal institutions. "The ban on inmate solicitation and group meetings, therefore, was rationally related to the reasonable, indeed to the central, objectives of prison administration." According to Rehnquist, whether the asserted First Amendment rights are speech or associational, an inmate forfeits that which is "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." When weighed against First Amendment rights the reasonable necessities of penal management were held sufficiently weighty to prevail. The differences between the Jaycees and Alcoholics Anonymous when contrasted with the union were found to be such that prison officials should be allowed to exercise their discretion about treating these groups differently, particularly since the groups are not so similar that discrimination against one is an abuse of discretion.

Justice Marshall, in his dissent, acknowledged the right to regulate the time, place, and manner of prisoner meetings and even to monitor them to protect against any violence, but he refused to support outlawing assemblies altogether. Marshall concluded "that where, as here, meetings would not pose an immediate and substantial threat to the security or rehabilitative functions of the prisons, the First Amendment guarantees Union members the right to associate freely, and the Fourteenth Amendment guarantees them the right to be treated as favorably as members of other inmate organizations."

Television

Zacchini v. Scripps-Howard Broadcasting Co. (45 LW 4954)

Zacchini's fifteen-second "human cannonball" act was videotaped and, without his consent, shown in its entirety on a television news program the same day as the performance. Zacchini alleged an "unlawful appropriation of his professional property" and sought relief through the Ohio state courts. The Ohio supreme court ignored Zacchini's claim and found the broadcasting company constitutionally privileged to include the cannonball act in its newcasts as a matter of public interest, protected by the right of publicity and contingent only upon no intent to injure Zacchini.

Justice White, for the Court majority of Burger, Stewart, Blackmun, and Rehnquist, acknowledged that entertainment as well as news enjoys First Amendment protection, but no one would be deprived of the benefit of Zacchini's performance so long as his commercial stake were recognized. Zacchini did not seek to enjoin the broadcast of his performance but only to be paid for it. White concluded that even though Ohio law may protect the press in similar circumstances, the First and Fourteenth Amendments do not require it to do so.

In dissent Justices Powell, Brennan, and Marshall regarded the majority opinion as insensitive to First Amendment values. The news clip was "a routine example of the press fulfilling the informing function so vital to our system." The dissent feared that a television news editor, unsure whether film footage might portray an entire act, would reject coverage of newsworthy events. The use made of the film footage (such as for routine news programming rather than commercial exploitation) should warrant constitutional protection. Zacchini, the dissent contended, having produced a newsworthy event, cannot, consistently with the First Amendment, protest routine news reporting.

Search and Seizure

U.S. v. Charles Ramsey and James Kelly (45 LW 4577)

By federal law postal regulations authorize customs officials to inspect without a warrant incoming international mail that they have a "reasonable cause to suspect" contains illegally imported merchandise. Correspondence, despite this exception to the Fourth Amendment, cannot be read without a warrant. A customs inspector within his authority conducted a border search of airmail envelopes and found heroin. For this the defendants were subsequently indicted. The defendants claimed that the border-search exception to the Fourth Amendment violated both their First and Fourth Amendment rights. The Court of Appeals reversed the lower court and held that a border search without a warrant was permissible as to persons, baggage, and mailed packages but did not apply to the opening of international mail. For that a warrant must be obtained.

Justice Rehnquist, for the Court majority, reversed the appellate court, referring to the long-standing, historically recognized border-search-without-a-warrant exception to the Fourth Amendment. Rehnquist concluded that because the reading of correspondence is forbidden even after international mail is opened without a warrant there is no denial of free expression and that any "chill" that might exist under such circumstances is not only minimal but wholly subjective.

Justice Stevens, joined in dissent by Justices Brennan and Marshall, protested that the opening of private letters without notice to the sender or the addressee is abhorrent to the individual's interest in private communication and thus violative of communication protected by the Bill of Rights. The dissent feared granting government a power that could lead to wholesale, secret examination of all incoming international mail.

III. Docketed: Other Cases

Disposed

The Supreme Court took action that in each of the following cases resulted in allowing the holding of the lower court to prevail except for one in which the judgment was vacated. The issues reported are pertinent to the First Amendment but do not necessarily include all issues raised by the appeal:

Government Personnel

Issues: Do rules limiting a policeman's right to criticize his superior officers violate the First and Fourteenth Amendments, and is there a denial of due process by a court that declines to consider the constitutional challenge by a policeman who is dismissed for violation of such rules? (Certiorari denied. Kwiek v. Board of Fire and Police Commission, 45 LW 3043)

Ruling below: The First Amendment is not violated by dismissal of a municipal fireman for "disregard of established administration policies, failure to follow the chain of command, insubordination, his 'demanding' attitude to his supervisors, and particularly because of a letter to his chief threatening action." Issue: Did the firing of the fireman who was also the union president impermissibly chill First Amendment rights? (Certiorari denied. International Assoc. of Fire Fighters v. Olson, 45 LW 3671)

Municipalities

Issue: Is a town's licensing ordinance consistent with the First Amendment if it allows imposing prior restraint on musical entertainment because of annoyance with past performances and a determination that the promoter's services and facilities were inadequate? (Certiorari denied. Stepping Stone Enterprises, Inc. v. Andrews, 45 LW 3060)

Ruling below: Although California nuisance statutes may be used to enjoin distribution or exhibition of materials judicially declared obscene, such statutes, under the First Amendment, cannot be used to close theaters and bookstores dealing with such material. Issues: Does the state court contradict Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975) by precluding the state from closing establishments for continuous exhibition or dissemination of obscene material? Does Miller v. California, 413 U.S. 15 (1973) empower the state to perpetually enjoin such establishments under public-nuisance statutes? (Certiorari denied. Van De Kamps v. Projection Room Theatre, 45 LW 3283)

Issues: When a defendant charged with mailing obscene materials is denied the right to present expert testimony on whether the materials appealed to the prurient interest of an average person, does the trial judge commit reversible error? May materials allegedly comparable to those found constitutionally protected in another case be regarded as outside constitutional protection in this case? (Certiorari denied. Baranav v. U.S., 45 LW 3181)

Ruling below: The court denied an injunction sought by the state under common-law public-nuisance theory to prevent a movie-theater operator from showing allegedly obscene films. Issues: Must a state statute aimed at regulation of hard-core pornography embody the obscenity test of Miller v. California? May a state use common-law public-nuisance proceedings to prohibit the sale and display of pornography? (Certiorari denied. Pennsylvania v. MacDonald, 347 A2d 290, 45 LW 3026)

Ruling below: Convictions for knowingly transporting obscene motion pictures in interstate commerce were upheld. The content of the films was stipulated by counsel, and an expert testified about their lack of value. Issue: Under Jacobellis v. Ohio, 378 U.S. 184, is the appellate court required to view allegedly obscene film, or do the stipulation and expert testimony suffice? (Certiorari denied. American Theatre Corp. v. U.S., 45 LW 3026)

Ruling below: Materials were found obscene under Miller v. California, 413 U.S. 15 (1973). Unless an effect can be shown on jury deliberations no reversal is in order, even though the trial court's instructions were based on national rather than local-community standards. Issues: Were the obscenity standards of the Miller case applied retroactively? Should defendants in such a situation receive an evidentiary hearing to determine if they were prejudiced by instructions to the jury? (Certiorari denied. Cutting v. U.S., 45 LW 3167)

Issues: Does a trial judge properly instruct a jury by telling it that expert testimony is not necessary to judge the obscenity of material designed for a particular deviant group and that prurient appeal can be determined by its effect on an average person or an average member of the deviant group? Should jury instructions specify that acceptable limits of candor and the matter of redeeming social value must be measured by the standards of the deviant group for which the materials are intended? (Certiorari denied. Dufault v. U.S., 45 LW 3035)

Ruling below: Under the circumstances of this case it was harmless error to declare that the national standard for determining obscenity was the "current community standard." Issues: Does knowledge of the contents of materials without knowledge of the nature and character of the materials jeopardize freedom of speech and due process? Does a conviction based on the jury's application of national standards violate First Amendment rights? (Certiorari denied. London Press, Inc. v. U.S., 45 LW 3316)

Issue: Does the Supreme Court's holding in Miller v. California, 413 U.S. 15 (1973) that obscenity determinations under local community standards may be made by jurors drawing on their knowledge of the community from which they come mean that a change of venue in an obscenity case is inconsistent with the interests of justice? (Certiorari denied. McManus v. U.S., 45 LW 3166)

Ruling below: The lower court took the position that the defendant could not rely on the obscenity test that required material to be "utterly lacking in social value" because a majority of the Supreme Court, even during the Roth-Memoirs era, never relied on this standard? Issue: Is a defendant charged with conduct that occurred before the test announced in the 1973 Miller case privileged to have applied to him only those standards which existed prior to the Miller case, or can he be convicted under the post facto Miller standards? (Judgment vacated. Friedman v. U.S., 528 F2d 784, 45 LW 3035)

Newspapers

Issue: Does a court err by dismissing judgments obtained by undercover narcotics officers against a newspaper for publishing their names, addresses, and telephone numbers? (Certiorari denied. Feldman v. Kunkin, 45 LW 3319)

Criminal Law

Issues: Can a conviction for conspiracy be upheld with no proof of specific intent other than statements protected by the First Amendment? Should the trial jury have been instructed that the First Amendment protects political speech and ideas, no matter how unpopular? (Certiorari denied. Henry v. U.S., 45 LW 3181)

Communications

Ruling below: A televised declaration to assassinate was found punishable as a threat transmitted in interstate commerce under 18 U.S.C., section 875(c). Issue: Could the conviction be sustained without proof of actual intent to carry out the threat? (Certiorari denied. Kelmer v. U.S., 45 LW 3195)

Issues: Does the FCC exceed its statutory authority by ruling that a licensee who chooses to broadcast a debate between fewer than all qualified candidates in an election, without having helped arrange the debate, is exempt from having to provide equal time under provisions of the Federal Communications Act? Does the new FCC definition of "on-the-spot coverage of bona-fide news events" require compliance with law requiring public notice and opportunity for public comment ? (Certiorari denied. Chisholm v. FCC, 45 LW 3164)

Ruling below: An FCC denial of a license to an applicant for a new FM station was justified because the survey of community leaders required by the FCC's "Primer on Ascertainment of Community Problems by Broadcast Applicants" failed to include interviews with leaders of the "poor," who make up 18.4 per cent of the families in the broadcast area. Issues: Was there sufficient compliance with the FCC Primer to justify the license? Did the FCC err by refusing to receive a second survey designed to meet the FCC's claims of inadequacy in the applicant's original survey? (Certiorari denied. Ramford v. FCC, 45 LW 3115)

Defamation

Ruling below: A county surveyor was a "public official" within the meaning of New York Times v. Sullivan, 376 U.S. 254 (1964) but not a "public figure" when allegedly libelous statements were made pertaining to work as a consulting engineer beyond his official conduct. Issues: Did the Texas Supreme Court err by not requiring proof of malice to determine that an elected public official was libeled by a newspaper article that did not relate to his official position or conduct? Should the amount of public interest demonstrated toward an official prior to an alleged libel determine whether the official is sufficiently a public figure that actual malice would have to be proved before a newspaper could be found to have published actionable libel? (Certiorari denied. Laredo Newspapers Inc. v. Foster, 541 SW2d 809, 45 LW 3513)

Ruling below: The California Supreme Court denied the appeal of a lower-court decision which found an editorial cartoon of a public figure to be possibly defamatory. Summary judgment for the newspaper was denied. Issues: Is it constitutionally permissible to place the burden of proof upon a newspaper to show the absence of "actual malice" in a libel action involving public figures and matters of public interest? When, in the sense of New York Times v. Sullivan, 376 U.S. 254 (1964), there is no defamation and no "actual malice," should a newspaper be subjected to the burden and expense of a jury trial? (Certiorari denied. Los Angeles Times v. Hartley, 45 LW 3119)

Ruling below: Evidence of ill will, hatred, and animosity is admissible to enable public officials to recover damages for defamation under the New York v. Sullivan, 376 U.S. 254 (1964) requirement that "actual malice be proved." Issue: Can ill will, hatred, and animosity be used to prove "actual" malice, or must "actual" malice be first demonstrated under the Sullivan rule? (Certiorari denied. Fleishman v. McFee, 45 LW 3059)

Ruling below: Punitive damages were awarded for allegations in a book that public figure William F. Buckley, Jr., "could be taken to court by any one of several people" about whom he lied. Sufficient proof of the author's knowledge of the falsity or reckless disregard of the truth existed to support the findings. Issues: Was the statement about Buckley a constitutionally protected statement of opinion? If not a protected statement, did Buckley fail to show that the statement was made with malice rather than merely the rhetoric of an ardent political opponent? Does the First Amendment forbid a punitive damage award to a public official in a libel action? (Certiorari denied. Littell v.

Buckley, 539 F2d 882, 45 LW 3389)

Issue: Should leniency be extended to one accused of libel when the meaning of an allegedly libelous passage is ambiguous? Should the court disregard the context in which the passage appears, go beyond what material would mean to an ordinary reader, and rely on sources not available to the reader? (Certiorari denied. Buckley v. Littell, 539 F2d 884, 45 LW 3403)

Pending

In each of the cases reported below the case has either been argued before the Supreme Court and no written opinion has yet been rendered, or the Court has yet to hear the case or otherwise dispose of it. Since the final disposition of some cases had not been reported at the time this review was prepared, the status of some pending cases may have changed between preparation time and publication.

Media

Ruling below: A Federal Communications Commission opinion exempting nonstudio debates and cnadidates' press conferences from equal-time requirements was found consistent with the congressional policy of "increasing broadcaster discretion and encouraging greater coverage of political news." Issue: Did the FCC err by exempting debates and press conferences from the equal-time provisions of Section 315 of the Federal Communications Act? (Pending. Democratic National Committee v. FCC, 45 LW 3115)

Issue: Does a court err by granting an injunction requiring a sheriff to give the news media greater access to jail facilities and prisoners than afforded the general public even though both the press and the public have an equal constitutional right of access? (Pending. Houchins v. KQED, 45 LW 3693)

Obscenity

Ruling below: A California law exempting a movie operator and projectionist from liability under an obscenity statute did not discriminate against a bookstore clerk who was charged with distributing obscene material. Issue: May a bookstore clerk be convicted solely on evidence that he worked in a store that sold sexually oriented materials and that he knew "that there was a picture of sexual behavior in a magazine sold by another" employee? (Pending. Kuhns v. California, 45 LW 3575)

Issue: Have the Illinois general assembly and the state supreme court made the word "obscene" sufficiently specific to satisfy the specificity required by Miller v. California, 413 U.S. 15 (1973)? (Pending. Reinhard v. Eagle Books, Inc., 45 LW 3284)

Ruling below: A federal pandering law (39 U.S.C., Section 3008) was held not to violate the First Amendment rights of one who mailed materials to those who complained to the Postal Service. Issue: Should the federal pandering law be held unconstitutional under the First Amendment despite a holding of constitutionality in Rowan v. Post Office Department, 397 U.S. 728 (1970)? (Pending. Rent-R-Books, Inc. v. U.S., 538 F2d 519, 45 LW 3451)

Defamation

Issue: Is an artist who alleges that a museum employee falsely charged him with forgery a public figure, thus requiring that actual malice toward the artist or reckless disregard for the truth be demonstrated in order for the employee to be guilty of defamation? (Pending. Mount v. Boston Athenaeum, 45 LW 3699)

Fighting Words

Ruling below: Obscene remarks about policemen and Negroes were held not to be fighting words outside First Amendment protection. The remarks made in the course of private but loud conversation at a crowded, racially mixed dinner were addressed to no one in particular, and no one responded violently, thus necessitating reversal of a disorderly conduct conviction. Issue: Did the defendant's comment about blacks when taken in context constitute an abusive epithet beyond constitutional protection? (Pending. Maryland v. Downs, 45 LW 3669)

Attorneys

Ruling below: A Virginia state bar-code provision prohibiting attorneys from supplying for publication non-fee information relating to their practice was held to be an unconstitutional restriction on commercial speech protected by the First Amendment. Issue: Can a state, pursuant to its authority to regulate the practice of law, do so by prescribing publication of information provided by attorneys to a consumer group? (Pending. Virginia State Bar v. Consumers Union of United States, 45 LW 3693)

Government Personnel

Ruling below: An assistant district attorney who disputed in public his superior's integrity in handling a criminal matter was denied First Amendment protection for speech that undermined the employment relationship and aroused public controversy. Issue: May truthful statements critical of the way a district attorney conducts his office be used as a basis for dismissal of a public employee who exercised his constitutional right to speak on a matter of public importance? (Pending. Sprague v. Fitzpatrick, 45 LW 3460)

IV. A Look Ahead

Justice Rehnquist shows no inclination toward yielding his conservative views, which limit the reach of the First Amendment. When pressed to justify his support of New York's ban on contraceptive advertising, Rehnquist took the position that

> Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's rooms of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction. (Carey v. Population Services International, 45 LW 4601)

Justice Rehnquist's convictions are deep-seated, and he does not hesitate to let individualistic thinking permeate his judicial opinions. There appears to be little Court support for some of his anachronistic views, although the end result finds him frequently in league with several colleagues who do not share the high priority assigned by Marshall and Brennan to First Amendment rights. Justice Rehnquist's influence on the more-susceptible members of the Court must not be underestimated in the year ahead.

Justice Stevens will be attempting to steer the Court away from what he regards as an unwise and unworkable approach to obscenity. During the past term Stevens dissented three times from the majority's use of the "community standards" test for determining what is and what is not obscene. Since he became Gerald Ford's appointee to replace William O. Douglas in December, 1975, Stevens has become more and more assertive that one person's obscenity may be another's art.

He believes that civil laws regulating place and type of distribution rather than criminal laws jailing booksellers and theater operators should control hard-core pornography. Since Justices Brennan, Marshall, and Stewart routinely dissent from most obscenity decisions, Justice Stevens will need to sway only one more justice to change the Burger Court approach to obscenity.

Justices Rehnquist and Stevens, each in his own way, will likely exert substantial influence on the reach of the First Amendment during the 1977-1978 term.

MINORITY OWNERSHIP OF BROADCAST STATIONS: THE DIVERSIFICATION POLICY

Mike Meeske
Florida Technological University

Minority-group members have long charged that they have been discriminated against in the hiring and programming practices of braodcast stations. Now another issue has been raised: the licensing of a broadcast station to a minority group as an outlet for the views of minority-group members.

The number of stations owned by minority groups is small. In 1971 the Civil Rights Commission reported that minorities owned none of the thousand television stations and only ten of the seventy-five hundred radio stations.[1] By 1976 minorities held licenses to three television stations and approximately 53 radio stations.[2]

In two major decisions--TV 9, Inc. v. FCC[3] and Garrett v. FCC[4]--the courts have directed the Federal Communications Commission to favor black ownership in deciding cases involving broadcast facilities. The directives provide a major incentive for minority-group citizens to compete for new or occupied facilities and therefore to diversify media content. Thus, my purpose in this article is to trace the development of the minority issue and to analyze the future implications of the rulings.

Minority Participation In Broadcasting

Before examining the cases that led the courts to give minority groups a preference in broadcast ownership one must consider the conditions that led to the decisions favoring minority participation. As noted above, minorities hold licenses to few of the radio or television stations in this country. As a result early efforts by minority groups focused less upon ownership and more upon access to existing stations. Citizens groups were formed to contest license renewals and sometimes file competing applications in instances where minority groups felt that station performance was not attentive to their needs.

A notable case occurred in the early 1960's when a group of citizens challenged the programming policy of WLBT-TV, Jackson, Mississippi. They maintained that the station did almost no local programming to serve the black community; that, also, it deleted civil-rights news from network newscasts. The FCC granted that station a one-year probationary license in 1965, but the Office of Communication of the United Church of Christ helped lead a successful court fight to deny Lamar Life Insurance the WLBT license.[5] Since 1969 the station has been operated by a biracial group of citizens.

In January, 1975, the FCC, in a historic decision, set another precedent by revoking the licenses of eight stations of the Alabama Educational Television Commission (AECT).[6] The action resulted from petitions, filed by citizens' groups, charging racial discrimination in programming and employment practices during the 1967-70 license term. The FCC agreed with the charges but allowed the state to reapply for the stations because of actions taken to correct the problems.

The WLBT and AECT cases represent the efforts of minority groups to change minority hiring and programming practices. While these cases did not involve minorities seeking station licenses, they paved the way for minority ownership as exemplified in the TV 9 and Garrett decisions.

The Orlando, Florida, Case

The precedential case, TV 9, Inc. v. FCC,[7] involved the question of who was to have the right to operate a TV station on Channel 9 in Orlando, Florida. In 1957 the FCC granted the application of Mid-Florida Television Corporation for a construction permit for Channel 9. A license was not granted, for it was charged that representatives of Mid-Florida had ex parte contacts with an FCC commissioner. The charge was dropped, but new applications for Channel 9 were allowed and comparative hearings eventually resulted.[8]

At the comparative hearings the issue of racial preference was raised by one of the applicants: Comint Corporation. Comint argued that it should have been given a preference over the other applicants because two of its stockholders were black, were on the board of directors, and would participate in management of the station. Dr. James R. Smith, a medical doctor, and Paul C. Perkins, an Orlando attorney, each owned about seven per cent of Comint Corporation.

Comint contended that black ownership would be in the public interest because approximately one quarter of the Orlando population was black and the interests of blacks had been neglected in the past by local broadcast stations. It pointed out that none of the twenty-six commercial television stations in Florida, including two others in Orlando besides Channel 9, was owned by blacks.[9]

The FCC Position. The FCC decided the issue on the basis of licensing standards contained in its Policy Statement on Comparative Broadcast Hearings ("Policy Statement").[10] According to the Policy Statement the two main goals of comparative broadcast hearings are to insure the "best practicable service to the public" and "a maximum diffusion of control of the media of mass communications."[11] These goals were to be achieved by considering such matters as (1) full-time participation in station operation by owners, (2) proposed program service, (3) past broadcast record, (4) efficient use of the frequency, (5) character, and (6) diversification of control of frequencies.[12] The foregoing criteria are not exclusive. Instead, consideration of any factor depends on the circumstances of the case.

The Commission's review board, in a decision the Commission accepted, awarded the construction permit to Mid-Florida,[13] the company that won the original grant and put the station on the air. The review board based its decision primarily on two criteria from the Policy Statement. The first was integration of ownership and management. The principal Mid-Florida stockholders--Mr. and Mrs. Joseph Brechner--owned 62 per cent of the corporation and planned to work full-time at the station.

The second criterion was "an unusually good broadcast record."[14] The mention of a good broadcast record was a reference to Mr. Brechner's previous role as manager and part owner of WGAY (AM), Silver Spring, Maryland.

Comint's claim of preference for its black ownership was denied by the review board even though the hearing examiner acknowledged that media ownership by blacks in the Orlando area was a "closed door." The examiner explained that

> The Communications Act, like the Constitution is color blind. What the Communications Act demands is service to the public...and that factor alone must control the licensing processes, not the race, color or creed of an applicant.[15]

"Black ownership cannot and should not be an independent comparative factor,"[16] the board added. "Rather, such ownership must be shown on the record to result in some public interest benefit."[17] According to the board such a showing was not made by Comint. Mid-Florida was awarded the license, and the commissioners unanimously denied petitions for the review of the board's decision.[18]

The commissioners, however, were not unanimous in their rationale. Commissioner Benjamin L. Hooks, the only black commissioner, wrote a separate statement, in which he surprisingly concurred with the Commission's conclusion but strongly disagreed with the view that black ownership _per se_ could not be considered to be in the public interest. He wrote:

> The proposition--simply spelled BLACK MEDIA OWNERSHIP IS IN THE PUBLIC INTEREST--is so self-evident in this day and age that I cannot endure agonizing a patient recrudescence of what the black struggle is all about.[19]

The Court of Appeals. On appeal, the U.S. Court of Appeals in Washington denied the award to Mid-Florida and remanded the case to the FCC for rehearing. Senior Circuit Judge Charles Fahy expressed concern about the heavy reliance on the _status quo_ in the communications industry and held that Comint should have been awarded a merit. He wrote:

> To say that the Communications Act, like the Constitution, is color blind, does not fully describe the breadth of the public interest criterion embodied in the Act...The thrust of the public interest opens to the Commission a wise discretion to consider factors which do not find expression in constitutional law.[20]

One of those factors, the court noted, is race. Citing its earlier decision in _Citizens Communications Center v. FCC_,[21] wherein the court ruled that applicants in comparative hearings must be judged on all relevant criteria, including plans for the integration of minority groups into station operation,[22] the court reiterated its position that minorities should have greater access to the broadcast media.

The court ruled that the Commission has misapplied the 1965 Policy Statement, for the objectives of the Statement did not preclude consideration of the racial issue. Rather, black ownership as a comparative factor was viewed as being consistent with the Statement's objective of diversification of media ownership. The unanimous court stated "...that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded."[23]

Judge Fahy said that the court was not requiring a quota system.[24] He made it clear that the FCC need not require advance assurance that minority-group ownership would lead to community service. "Reasonable expectation, not advance demonstration," he said, "is a basis for merit to be accorded relevant factors."[25] Finally, he stated that even though nonminority applicants proposed to present the views of the Orlando black community, their proposals could not offset the merit accorded Comint.[26]

Mid-Florida and the Commission sought a rehearing before the full bench of the circuit court, but the request was denied by a 5-4 margin. The court, however, filed a supplemental opinion in which it attempted to clarify the earlier ruling. It stated that even though Comint was awarded a merit, other applicants could prove on remand that they could better serve the Orlando community than Comint.[27]

The supplemental opinion also applied the "reasonable expectation" standard to the role of Dr. Smith and Mr. Perkins. Although their positions were not technically managerial, it was likely that their stock ownership and identification with minority efforts would have a meaningful effect upon station programming and produce a service to the black community.[28]

The four dissenting judges found the distinction between "merit" and "preference" to be constitutionally suspect because of the reliance on race. The four would have granted the petitions for rehearing. The case was appealed to the Supreme Court; but the high court, without opinion, refused to review it.[29]

The Huntsville, Alabama, Case

The FCC Position. The second case sent back to the FCC did not involve a comparative hearing; rather, the case involved the request of Leroy Garrett, the black owner of WEUP (AM) Huntsville, Alabama, to operate the station full-time instead of daytime only. In its initial ruling on the case the Commission's review board denied the request on the ground that the proposed nighttime service would not meet the Commission's coverage rules and said that there was no basis for a waiver.[30]

The Court of Appeals. Judge Spottswood Robinson III, writing for a unanimous court, remanded the case to the FCC with black ownership as a major consideration. The court said the review board should have considered the station's black ownership and operation as significant. Referring to the precedent set in the TV 9 decision, the court repeated that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded."[31] WEUP, the court noted, is solely owned by Garrett, is largely staffed by blacks, and thus represents "one of the 'infinitesimal' number of black-owned-and-operated broadcasting stations in the United States."[32]

As a result, the court directed the Commission to reevaluate its decision on applicability of the coverage rules in the light of past precedents and, if necessary, its conclusion in the light of TV 9.

Implications

By ruling in favor of black ownership the Cou[illegible] Appeals for the District of Columbia further extended its policy of cr[illegible]ng diversity of broadcast ownership. In Greater Boston Television Corp. v[illegible] the court said that the FCC should "seek in the public interest to [illegible] licensees those who would speak out with fresh voice, would most na[illegible]ura[illegible]itiate, encourage and expand diversity of approach and viewpoint."[34] In Citi[illegible] Communications Center v. FCC, the court stated its position that "as new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies."[35]

In TV 9 and in Garrett the court has given the FCC a strong mandate to consider minority ownership to encourage diversity of ownership. Moreover, the court has made it clear that it will not hesitate to review and overturn Commission decisions it believes are not in the public interest.

There are, however, specific problems the FCC must face. One is the weight to give applicants that include minority-group members. The court said only that black ownership was not to be offered as a "mere token"; it did not define what degree of ownership that would be. Commissioner Hooks indicated that he would consider any equity in excess of 5 per cent to be "substantial" ownership.[36] But any formula based on the amount of minority ownership is unworkable. Such a policy might lead competitive applicants to strive for numerical supremacy. The applicant with the most black stockholders would win. That approach would hardly serve the public interest.

A related question is the role minority-group members must play in a corporation if their presence is to deserve a preference. Garrett was owner of his station. Perkins was to work part-time while Smith was only to serve on committees. Should a minority owner or company principal deserve preference? It is a question the FCC must answer. A Commission official summed up the prevailing view as follows:

> Black ownership is not necessarily determinative, but it could be decisive if all other things are equal--especially if the minority group member is an officer or director, or has a major management role, or is a substantial stockholder.[37]

It seems difficult to envision any formula. A case-by-case examination appears most reasonable.

The final question is a philosophical one: Will minority ownership mean diverse programming? In the *Mid-Florida* case the FCC indicated that it did not believe that part minority ownership would render a program service that other operators could not provide. The Appeals Court, however, felt that minority ownership would better present the needs of the black community and directed the FCC to consider it as a merit in comparative license renewals. The outcome is unclear. The FCC can be expected to approach such cases with caution. The key seems to be the degree of active minority participation. A company with several minority stockholders holding little stock and not participating in day-to-day operation would not likely direct extensive programming to the interests of the minority community. A station owned or largely controlled by minority group members who operate the station might be expected to program more directly to a minority audience.

FOOTNOTES

[1] United States Commission on Civil Rights, Federal Civil Rights Enforcement Effort, 280 (1971).

[2] "Black Owned Broadcast Properties," *Air Time*, Vol. 2, No. 7 (Washington: National Association of Broadcasters, 1976), pp. 9-10.

[3] 495 F. 2d 929 (D.C. Cir 1972), *cert. denied*, 95 S. Ct. 245 (1974).

[4] 513 F.2d 1056, (D.C. Cir. 1975).

[5] *Office of Communications of the United Church of Christ* v. *FCC*, 425 F.2d 543 (D.C. Cir. 1969).

[6] Alabama Educational Television Commission, 50 F.C.C. 2d 461 (1975).

[7] 495 F.2d 929 (D.C. Cir 1972), *cert. denied*, 95 S. Ct. 245 (1974).

[8] Applicants included Central Nine Corp., Florida Heartland Telev., Mid-Fla. TV Corp., Comint Corp., and TV Nine. Subsequently, the FCC approved the name Ch. 9 of Orlando for the interim operation.

[9] Brief for Appellant Comint at 35, TV 9, Inc. v. FCC, 495 F. 2d 929 (D.C. Cir. 1973). In the initial decision Dr. Smith testified on the importance of ownership by blacks. He said,"They should be part owners as part of the community." 33 F.C.C. 2d 34, 170 (1970).

[10] 1 F.C.C. 2d 393 (1965), see also *Documents of American Broadcasting*, ed. Frank Kahn, (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1973), p. 543.

[11] 1 F.C.C. 2d at 394.

[12] 1 F.C.C. 2d at 394-398.

[13] *Mid-Florida Television Corp.*, 33 F.C.C. 2d 1, 22 (1972).

[14] *Mid-Florida Television Corp.*, p. 11.

[15] *Mid-Florida Television Corp.*, p. 17.

[16] *Mid-Florida Television Corp.*, p. 18.

[17] *Mid-Florida Television Corp.*, p. 18.

[18] *Mid-Florida Television Corp.*, 37 F.C.C. 2d 559 (1972). Since the Commission accepted the Review Board decision, the Board's decision carried the force of a decision by the Commission itself.

[19] 37 F.C.C. 2d 562-63.

[20] 495 F.2d at 936. Justices Bazelon and Robinson joined Judge Fahy in hearing the case on appeal. Besides the racial preference issue other issues raised on appeal included the admissibility of Mid-Florida's prior operation of Ch. 9, the *ex parte* contacts, and the federal indictment of a former officer of of Mid-Florida.

[21] 463 F.2d at 822. (D.C. Cir. 1972).

[22] 463 F.2d at 823.

[23] 495 F.2d at 938.

[24] 495 F.2d at 937-38.

[25] 495 F.2d at 938. This ruling directly contradicts that of the administrative law judge in the initial FCC decision.

[26] 495 F.2d at 938. The court based this ruling on the fact that minority ownership had historically proven to be influential in achieving diversity in editorial content and presentation.

[27] 495 F.2d at 941 n.3.

[28] 495 F.2d at 942.

[29] 495 F.2d 929 (D.C. Cir. 1973), *cert*. *denied*, 95 S. Ct. 245 (1974).

[30] Leroy Garrett, 41 F.C.C. 2d 617 (1973).

[31] *Garrett* v. *F.C.C.*, 513 F.2d 1056, 1063 (1975).

[32] *Garrett* v. *F.C.C.*, p. 1061.

[33] 444 F.2d 841 (D.C. Cir. 1970), *cert*. *denied*, 403 U.S. 923 (1971).

[34] 444 F.2d at 860.

[35] 447 F.2d 1201 (D.C. Cir. 1971).

[36] 37 F.C.C. 2d at 564 n. 19.

[37] "Minority Edge in Comparative Cases Survives Highest Appeal," 87 *Broadcasting*, 23, Nov. 4, 1974.

THE LABADIE COLLECTION: A RESEARCH REPORT

Don Center
University of Illinois

Historical research in free speech is often hampered because the contents and location of primary materials are unknown or at least unpublicized. As a result the efforts of rhetorical scholars pursuing such avenues of investigation are limited. In a continuing effort[1] to help fill this void this writer will describe and evaluate the largest free-speech collection in the United States--the Labadie Collection.[2]

The original collection compiled by Joseph Labadie consisted of some three thousand pamphlets and periodicals dealing with this country's early labor movements. Known as the "gentle anarchist," Labadie began his labor activities in 1878, when he and others, founded the Noble Order of the Knights of Labor, which met in secret in the quaint disguise of the Washington Literary Society. For the next fifty years Labadie, both as a perpetual political candidate and as a socialist reformer, devoted his life to the "struggle of the underdog for a fair field."

In 1911 Labadie ignored persistent efforts of scholars at Johns Hopkins University and the University of Wisconsin and donated his collection to the University of Michigan. Since then, thanks to the diligent work of Agnes Ingales, curator of the collection until her death in the early fifties, the collection of anarchist and labor materials has been expanded to include all phases of freedom of expression. More than thirty thousand items now comprise this valuable collection housed in the Rare Book Room at the University of Michigan.

The materials date from the early nineteenth century to the present and range from books, pamphlets, and periodicals to records, tapes, buttons, badges, and armbands. Based on the requirement that a work must deal with some aspect of freedom of expression, the collection receives some thousand new items annually. The bulk of the collection is comprised of some seventy five hundred pamphlets, twelve thousand five hundred periodicals, four thousand books, and six thousand more ephemeral items. It is a valuable depository of primary materials.

The collection consists of a wide variety of subjects under the broad category of freedom of expression. It includes such topics as American Defense Societies, Birth Control, Blue Laws, the Ku Klux Klan, Libertarians, Madlyn Murray O'Hare, Suppression of Sexual Materials, and the Women's Movement. More than 1,300 linear feet of shelves hold the voluminous materials. Anarchism alone is represented by forty linear feet of shelves. Socialism accounts for twice that many. Subject headings range from Academic Freedom to Postal Censorship, from Emma Goldman to Racial Discrimination in Russia.

The periodical collection is undoubtedly best. The range of anarchist periodical literature is probably unsurpassed anywhere in the world, extending through a dozen countries and languages. Early American labor magazines include The Agitator (1910-1912), Freedom (1886-1936), The New Time (1893-1898), The Iconoclast (1870-1871), and The American Freeman (1895-1951). About five hundred radical newspaper titles from the 1960s and 1970s, reflecting a variety of extremist views, add to the significance of this part of the collection. Such periodicals include the Ann Rand Letter, Avant-Garde, Defense De L'Homme, Marxist Quarterly, Inter-Racial Review, Life Lines, Proletarian, and the Rockwell Report.

As it is not feasible to list all the subjects, much less all the items in the Labadie Collection, and since this report is intended to aid scholars interested in radical aspects of freedom of expression, I have used a general subject listing according to First Amendment concerns. While the listing is in no way inclusive, it does provide a sampling of the items available.

Freedom of Religion

Anti-Semitism. More than one hundred fifty modern anti-Semitic tracts are included in this file collected mainly by Jewish leaders in Michigan.

Black Muslims. Two hundred twelve items relating to this group.

Freethinker's Magazine, 1850-1851. A London journal of ethics and theology.

The Index, 1870-1886. Published by the Free Religious Association of Toledo and Boston.

Ingersoll, Robert G. The folder on this nineteenth-century American agnostic includes rare photos, speeches, and tracts.

Religious Pacificism. More than four hundred items on this subject date from 1901 to 1974.

Sermons. Several sermons on anarchist and anarchism are dated in the 1880s.

Freedom of Assembly

Aliens and Dissenters. A massive file of potpourri material.

Badges. Nearly one hundred badges, buttons, and armbands representing extremist groups: anarchists, pacifists, communists, the National States Rights Party, and the American Nazi Party.

Berrigan, Daniel. Some one hundred items concerned with his civil-disobedience actions.

Detroit Labor Meetings. Reports of the police breaking up labor meetings in the 1880s.

Free Thought Conventions. Including a report of the August 22, 1878, convention at which several persons were arrested for a variety of so-called crimes.

I.W.W. More than one thousand pamphlets and three hundred court cases are filed under the subheading "Criminal Syndicalism Trials/Laws."

Women's Movement. More than five hundred items, including accounts of various feminist conventions ranging from the 1848 Seneca Falls Convention to recent assemblies.

Freedom of the Press

Carlile, Richard. This folder includes most of his written attacks upon the King of England, including *The Republican* (1823) and *Loaves and Fishes* (1817).

Curry, John. The strange 1918 case of John Curry, who was arrested in 1918 on a streetcar for silently reading George Bernard Shaw's *The Unsocial Socialist*.

Ginsburg, Ralph. A variety of materials on this man's obscenity trials, etc.

The Little Prick. A racy, ridiculing pamphlet published by radical feminists in the 1970s.

Nearing, Scott. Several items related to the 1918 case concerning Nearing's "The Great Madness."

Protest Books. Both the books and a variety of commentaries.

Russian Censorship. Two hundred twenty-six items on this topic.

Freedom of Speech

Burns, Phil. Material concerning a 1975 controversy over a teacher who belonged to the Progressive Labor Party. This case has been called "A Connecticut Communist in a Kangaroo Court."

Chants of Labor. A ninety-nine-page compilation of protest songs: 1888.

Eastman, Max. A thorough collection of his speeches and writings.

I.W.W. A five-volume collection of Wobbly songs plus a separate set of "Joe Hill Memorial" songs.

Ku Klux Klan. Includes more than two hundred items. Of unusual interest are a 1923 KKK songbook and several reel-to-reel tapes of KKK "fervor" songs.

Right of Free Speech. This textbook series was published in the 1940s by Row, Peterson, and Co. for use in the upper elementary grades. It contains dramatized stories of "freedom of speech" from Tacitus to Norman Thomas.

Schroder, Theodore. Perhaps the largest collection of speeches and writings by this freethinker.

To researchers interested in materials dealing with freedom of expression the Labadie Collection offers two attractive features: abundance and rarity of materials. More than ninety-five per cent of the items directly deal with freedom of expression and thought. It would be difficult for a scholar to discover an area in this broad category which is not covered in some way by items in this collection. Unfortunately, it has two serious weaknesses: First, in general only the books are catalogued; the remaining twenty six thousand items have only a general subject listing. The researcher, therefore, has to look through one or more subject files to discover whether or not a specific item is available. A second problem is the lack of cross-referencing. An article by Max Eastman might appear under "Eastman," "Freedom of Expression," or "Freedom of Speech," or a number of other headings, and no cross-referencing system is provided.

These problems hinder but do not destroy the usefulness of the collection. While a researcher's task is made difficult because of these drawbacks, the collection remains a most valuable source of primary materials and stands as a tribute to Labadie's dedication to the truth expressed in a remark by Wendell Phillips: "The community that will not allow the humblest citizen to freely express his opinion, no matter how false it be, is only a gang of slaves."

FOOTNOTES

[1] The first of this series was "The Baskette Collection: A Research Report," *Free Speech Yearbook*, VII (1976), 78-82.

[2] According to Lee Ash, *Subject Collections* (New York: R.R. Bowker Co.,

1974), p. 278, the Baskette Collection ranks second in size to the Labadie Collection.

"CONGRESS SHALL MAKE NO LAW . . ." A COMPUTER-ASSISTED CONTENT ANALYSIS OF THE DECISIONS OF JUSTICE WILLIAM O. DOUGLAS ON THE ISSUES OF OBSCENITY AND PORNOGRAPHY

Raymond S. Rodgers
University of Oklahoma

On the evening of February 13, 1939, William O. Douglas left his office at the Securities and Exchange Commission and drove to the Georgetown apartment of his friend Edmund Pavenstadt. When he arrived, his host requested the attention of the other guests and announced that Arthur Krock of the New York Times had a toast to make. As the guests raised their glasses, the reporter said, "To the next Justice of the Supreme Court." Douglas did not know that the great Louis D. Brandeis had that day sent his letter of retirement to President Franklin D. Roosevelt. Brandeis was delighted as the name of Douglas was urged on Roosevelt by such luminaries as William Borah, Jerome Frank, and Robert M. LaFollette.[1] Ironically the liberals, led by Gilbert Harrison, I.F. Stone, and Max Lowenthal, fought the Douglas appointment because they feared that he was "too conservative."[2] Nevertheless, he was confirmed by the Senate on April 4, 1939, and took his seat on the Court on April 17, thus beginning one of the most-distinguished careers--and the longest--in the history of the United States Supreme Court.

No doubt if those concerned liberals could have looked ahead into the thirty-six year-career of the "conservative" Douglas they would have first been pleased and then a little shocked to see his ideology move farther and farther to the left until his reputation became that of perhaps the most-liberal jurist ever to sit on the Supreme Court. The purpose of this study is to trace the evolution of the personal and judicial attitudes of Douglas on one of the most-sensitive issues to come before the Court during his tenure--obscenity and pornography--as made manifest in his written decisions.

In many studies of judicial behavior it is axiomatic that Supreme Court justices tend to remain ideologically static during thier tenure on the Court. Erwin N. Griswold has asserted that "most justices have followed a rather consistent course after taking their seats on the Court" and that, therefore, "one never refers to 'the early Hughes' or 'the later Brandeis.'"[3] It would appear, however, that Douglas is an exception to this rule. Indeed, Wolfman, Silver, and Silver have argued that "in the tax field at least, there has been a very considerable change in the viewpoint of Mr. Justice Douglas during the long period of his service on the Court."[4] Douglas's opinions on obscenity and pornography have likewise undergone change, but the changes have been neither sudden nor obvious. The Justice's former law clerk--Vern Countryman, himself now a distinguished legal scholar--explained that "as Douglas has grown on the job, as experience and reflection persuade him that he himself has been in error, he has not hesitated to take a new position."[5] That has certainly been borne out in the area of obscenity and pornography. Douglas's opinions in this area of law spanned more than thirty years and underwent several shifts during that time. This study traces those shifts along two dimensions--personal attitude and judicial attitude as both are made manifest in his opinions and dissents. It also attempts to draw some conclusions about where he stood on the issues over the span of his career.

LEXIS

Morris L. Cohen, professor of law and law librarian at Harvard University, has pointed out that there are currently about three million cases on record in Anglo-American jurisprudence and that the number is growing at the rate of around thirty thousand a year.[6] Thousands of these cases emanated from the United States Supreme Court, and nearly fifteen hundred came from the pen of Douglas. Cohen suggests that "traditional legal research techniques are rapidly proving inadequate to permit access to [such] vast, continually expanding reservoirs of information."[7] The natural response to this plethora of data has been computerized legal-data retrieval systems. One such system was used in the early stages of this study.

The Mead Corporation of Dayton, Ohio, has developed a highly sophisticated and versatile system of legal-data storage and retrieval called LEXIS. Application of LEXIS and other computer systems to the area of legal research is still relatively new, but it has great potential. A few of the essential features of LEXIS will be explained here in order to facilitate understanding of the present study.

According to the short form of the LEXIS desk book, the central principle of the system is "the determination by the researcher of words, phrases, and numbers, and combinations of these, which are likely to occur in cases or statutory material which may be useful to the researcher."[8] This Key-Word-in-Context (KWIC) approach has numerous advantages over traditional research methods, not the least of which is its particular suitability to the prose style of Supreme Court Justices. Frequently each Justice is playing the role of social or moral philosopher as much as jurist. Writings of the Justices cover a broad range of concepts, many of which (the *obiter dicta*) may not be directly relevant to issues at hand. Traditional citators will not retrieve obscure and tangential remarks, even though they may be of interest to the lay researcher. But with the assistance of KWIC a researcher can plug in any word or phrase, and the computer will retrieve all cases in which it appears, whether it is central to the case or not.

The KWIC ability of LEXIS rests on its full-text approach to data storage; for "the full, natural text of an appropriate set of documents. . . is stored character by character, precisely as published, in a computer's memory bank."[9] As of March, 1976, the LEXIS system contained several "libraries," including all United States Supreme Court cases dating back to January 1, 1938. This made the system particularly suitable for researching Douglas because, since his tenure began a year and a half after that, all his decisions are stored.

As with traditional research methods, intuition, basic skills, and practice are necessary for successful computer-assisted data retrieval. With LEXIS, this means the proper phrasing of search requests. Complete instructions and options for phrasing search requests can be found in the LEXIS Desk Book,[10] so the present study will be restricted to explaining requests formulated by this researcher for this and other studies on Douglas.

Like other computerized data-retrieval systems (such as ERIC), LEXIS functions by combining features such as KWIC, various connectors, and limitors. The KWIC feature allows the computer to retrieve any case in which the specified words or phrases appear. The connectors, such as OR, AND, W/N (within N words of the specified word), AND NOT, and BUT NOT, serve to broaden a search request according to the needs of the researcher. The limitors, such as DATE and SEG (a specified segment of the opinion such as opinion, dissent, headnotes, citation, etc.), serve to restrict the request to conform to the researcher's needs. The DATE limitor can restrict the search to a period before a given date, after a given date, or between two dates. The W/SEG limitor will restrict the search to NAME (the name of the case), CITE (the citation of the case), DISSENT (only the dissenting opinions), OPINION (only the majority opinions), OPINIONBY (only the opinion of a specified member of the majority), DISSENTBY (only the opinion of a specified member of the dissent), and so forth.

The present study was based on a query requesting all cases conforming to "dissentby [Douglas] or opinionby [Douglas] and prurient or obscene or lewd or licentious or obscenity or pornography." The yield was fifty cases. As the purpose of this study was to measure both personal and judicial attitudes, the search request produced some cases that had only a personal dimension (*dicta*) and some with only a judicial dimension that were personally neutral. After a careful reading of all retrieved cases only twenty-four were judged to be relevant to the study. Because this study was interested only in the use of the relevant terms by Douglas himself, only those cases in which the specified terms were found in his own words (including references to previous decisions of his own) were deemed relevant. On the other hand, some of the cases retrieved had nothing to do with obscenity or pornography (such as Dennis v. United States) but Douglas commented upon those concepts, and consequently the case was retrieved by the computer. In such cases the personal dimension was evaluated in the same way as others, and the judicial dimension was scored according to the implications inherent in the personal comments. For example, in the Dennis case Douglas remarked that obscenity "should be beyond the pale" of First Amendment protection.[11] Thus, the case was scored as Personally Neutral (no evaluative comments about obscenity itself) and Judicially Unfavorable (for he indicated that he would not extend to it the protection of the First Amendment).

Methodology

The methodology employed in the analysis of the Douglas decisions was a form of content analysis known generically as direction analysis. Lasswell, Lerner, and Pool define direction as "attitude expressed toward any symbol by its user."[12] Recognizing the inferential problems involved in the manifest versus latent argument in content analysis, Budd, Thorpe, and Donohew suggest that "the content analyst has no way of knowing what attitude the writer of a communication intended to convey."[13] That probably overstates the case. Charles Osgood has provided an assumptive framework from which the content analyst can take a bit more comfort. In "The Representational Model and Relevant Research Methods,"[14] he offers the representational model of language which posits that words "express" the ideas of the source and "signify" ideas for the receiver. If one is willing to accept this assumption, one is then able to make inferences about attitudes based on manifest content.

The present study assigned the decisions of William O. Douglas on obscenity and pornography to five categories:

1. Personally Favorable: those cases in which the source manifestly states that the material in question, either specifically or generically, may have literary, political, social, or scientific merit, or otherwise indicates personal approval.

2. Personally Unfavorable: those cases in which the source manifestly states that the material in question, either specifically or generically, is offensive, disgusting, or otherwise indicates personal disapproval.

3. Personally Neutral: those cases in which the source manifests no personal subjective remarks about the material in question, either specifically or generically, or in which the personal remarks were so balanced that no clear direction could be discerned.

4. Judicially Favorable: those cases in which the source voted to extend to the material in question, either specifically or generically, the protection of the First Amendment, or implied that he would.

5. Judicially Unfavorable: those cases in which the source voted to exclude the material in question, either specifically or generically, from protection by the First Amendment, or implied that he would.

The procedure in this study was first to read each of the fifty cases retrieved by LEXIS and to determine their relevance according to the criteria mentioned above. After the relevant cases were identified and tagged, each case was reread and judged for personal and judicial direction. When the cases had been judged and tagged in both dimensions, a chronological chart was compiled. This showed the evolution of Douglas's attitudes toward obscenity and pornography. The results are shown on the chart following.

Discussion

Results of the content analysis of the Douglas decisions seem to warrant three conclusions: (1) From 1951 to the end of his career Douglas did not in any way indicate that obscenity and pornography should not be protected by the First Amendment. There were, however, two cases early in his career (Hannegan v. Esquire

William O. Douglas' Decision on Obscenity and Pornography

Number	Date	Citation	PF	PU	PN	JF	JU
1	2/4/46	Hannegan v. Esquire, 327 US 146			*		*
2	6/4/51	Dennis v. United States, 341 US 494			*		*
3	6/24/57	Roth v. United States, 354 US 436			*	*	
4	6/24/57	Kingsley v. Brown, 354 US 463			*	*	
5	1/23/61	Times Film v. Chicago, 365 US 43			*	*	
6	2/21/66	Memoirs v. Massachusetts, 383 US 413			*	*	
7	3/21/66	Ginzburg v. United States, 383 US 463	*			*	
8	6/12/67	Jacobs v. New York, 388 US 431			*	*	
9	4/22/68	Ginsberg v. New York, 390 US 629		*		*	
10	12/15/69	Byrne v. Karalexis, 396 US 976			*	*	
11	2/23/71	Dyson v. Stein, 401 US 200			*	*	
12	11/6/72	Council v. School Board, 409 US 998			*	*	
13	6/21/73	United States v. Orito, 413 US 139			*	*	
14	6/21/73	United States v. 12 Reels Film, 413 US 123		*		*	
15	6/21/73	Paris Adult Theatre v. Slaton, 413 US 49		*		*	
16	6/21/73	Miller v. California, 413 US 15			*	*	
17	6/25/73	Heller v. New York, 413 US 483			*	*	
18	10/23/73	Trinkler v. Alabama, 414 US 955			*	*	
19	10/23/73	Carlson v. Minnesota, 414 US 953			*	*	
20	6/24/74	Hamling v. United States, 418 US 87	*			*	
21	10/29/74	Star v. Preller			*	*	
22	10/29/74	Gentile v. United States, 419 US 919			*	*	
23	1/20/75	Pryba v. United States, 419 US 1127			*	*	
24	3/18/75	Southeastern v. Conrad, 420 US 546	*			*	

PF: Personally Favorable; PU: Personally Unfavorable; PN: Personally Neutral

JF: Judicially Favorable; JU: Judicially Unfavorable

Note from a Critic on the Editorial Board: The classification of "personally favorable" is at least questionable. In Ginzburg, Douglas is speaking of the evidence regarding Eros and not making a favorable comment about obscenity either in general or in this specific case. Nor does Hamling or Southeastern express clearly a personally favorable attitude toward obscenity.

pornography be found. Three seemed to the present writer to reflect a favorable attitude, and three reflected an unfavorable attitude. They did not follow a chronological pattern, as did his judicial attitude. The remaining eighteen cases were judged to be personally neutral.

The major obscenity cases of the 1950's and 1960's began with Roth v. United States (354 US 436) in 1957. Although Douglas wrote opinions in that case, along with Kingsley v. Brown (354 US 463), Times Film v. Chicago (365 US 43), and Memoirs v. Massachusetts (383 US 413), it was not until the much-publicized Ginzburg v. United States (383 US 463), announced March 21, 1966, that a personal evaluation of obscenity and pornography could be found in his decisions.

Ralph Ginzburg had been convicted of using the mails to advertise obscene material (Liason, Eros, and The Housewife's Handbook on Selective Promiscuity). He had added insult to injury by attempting to obtain postmarks in Blue Ball and Intercourse, Pennsylvania, and had succeeded in doing so in Middlesex, New Jersey. A 5-4 Court upheld his conviction. Justice Brennan, writing for the majority, cited the "leer of the sensualist" and added the final prong to the so-called "Roth Test, Revised," that being the "pandering" element. What this amounted to was that a work not otherwise convictable for obscenity could become so on the basis of its advertising alone.[20]

The tone and content of Douglas's powerful dissent in Ginzburg combine to reflect a personally favorable attitude toward the material in question in the case. He began by directly confronting the "pandering" notion. "This new exception," he said,

> condemns an advertising technique as old as history. The advertisements of our best magazines are chockful of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyer's attention to lotions, tires, food, liquor, clothing, autos, and even insurance policies. The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed.[21]

Douglas followed his opening shot by citing the testimony in the trial of a clinical psychologist, a Baptist minister, and the Chairman of the Fine Arts Department at New York University as all thinking that the material in question had either scientific or artistic value. He summarized by saying: "Suffice it to say that this seems to be a book of some literary stature. At least I find it difficult to say that it is 'utterly without redeeming social importance.'"[22] But before too much emphasis is placed on this decision, it should be recalled that the operational definition of *Personally Favorable* used in this study stipulates that the attitude may refer to the material "either specifically or generically." What this case does establish is a favorable attitude toward specific works of literature; what it does not establish is an attitude toward a genre of literature.

The next relevant case to be retrieved by LEXIS was Jacobs v. New York (388 US 431), which was judged to be *Judicially Favorable and Personally Neutral*. Here the judicial attitude took the form of a dissent from dismissal of appeal on the grounds of mootness. Douglas pointed out, as did Chief Justice Earl Warren, that the case should be heard because of the serious constitutional issues involved in a state's convicting a person under obscenity statutes and then suspending sentence. Douglas argued that such a procedure could be a ploy to circumvent judicial review of the state's laws. He urged that the Court should continue to be "watchful lest coercive measures exercise an in terrorem effect which intimidates people from exercising their First Amendment rights."[23]

In April, 1968, less than a year after Jacob v. New York, came Sam Ginsberg v. New York (390 US 629). Sam was no relation to Ralph, though both were convicted on obscenity charges. Despite the irony of names and the seemingly and Dennis v. United States in which he made implicit remarks suggesting an unfavorable judicial attitude. It should be stressed, though, that he never once actually voted to exclude the material from constitutional coverage. (2) Most of Douglas's opinions contain no language that reveals clearly favorable or unfavorable personal attitudes toward obscenity and pornography. (3) In only six cases did he reveal personal attitude. Three were scored favorable, and three unfavorable.

The case of Hannegan v. Esquire in 1945 was the first one involving obscenity and pornography in which Douglas authored an opinion. The case presented difficulty in coding because of the intricacies of the facts and findings involved. Postmaster General Hannegan had revoked the second-class mailing privileges of Esquire, not because it was found to be obscene, but because he felt it did not comply with the fourth condition necessary for granting of second-class rates as set forth in Section 14 of the Classification Act of 1879, which stipulated that the material "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers."[15] Hannegan's report had asserted that in order to receive the second-class permit a publication not only had to refrain from obscenity and pornography but was "under a positive duty to contribute to the public good and the public welfare."[16]

In a style and with a clarity of analysis that would be heard many times in the next thirty years Douglas cut through the legal and bureaucratic technicalities and, speaking for the majority, suggested that this "controversy is not whether the magazine published 'information of a public character' or is devoted to 'literature' or to the 'arts.' It is whether the contents are 'good' or 'bad.' To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred."[17]

That would lead one to classify the case as Judicially Favorable until one notes that the magazine was not charged with being actually obscene. If Esquire had been found to be obscene, Douglas apparently would have voted to uphold the Postmaster General's revocation order. Toward the end of his opinion he wrote that "the *validity* of the obscenity laws is recognition that the mails *may not* be used to satisfy all tastes, no matter how perverted"[18] (emphasis added). Thus, even though Douglas would not sustain the censorship powers of the Postmaster General as a matter of routine authority, he clearly asserted that (1) the obscenity laws were valid and that (2) the mails could not be used to transport it.

It was more than five years later before another Douglas opinion addressed the concepts of obscenity and pornography. Again, it was only in a tangential way. This case was the infamous Dennis v. United States (341 US 484) which upheld the convictions of a group of Communists for violating the Smith Act. Although Douglas this time was issuing a powerful and cogent dissent and although the case did not deal at all with obscenity and pornography, LEXIS retrieved it because of the following sentence in the first paragraph of his opinion: "The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale Along with Obscenity and Immorality"[19] (emphasis added). This sentence warrants classifying Douglas's attitude at this point in his career as judicially unfavorable toward obscenity and pornography. But two caveats are in order here: (1) This case predated all the major obscenity cases by six years. (2) This was the last time in his career that Douglas would so much as hint that he would not extend the First Amendment protection to the material, either specifically or generically. Thus, the conclusion seems justified that Douglas favored extending constitutional protection to particular media expressions of obscenity and pornography, at least for some time after 1951 until his retirement in 1975.

The question of where he stood in his personal attitude as reflected in his Supreme Court decisions is less clear. In only six of the twenty-four cases examined in this study could personal evaluations of the merits of obscenity and frivolous nature of the case (Sam was convicted for having sold two "girlie" magazines to a sixteen-year-old boy) it should be stressed that this case was the beginning of the formulation of the concept of "variable obscenity," a notion referring to the sale of pornographic literature to juveniles. It is of singular importance to this study because it contains the first example of an unfavorable personal attitude toward obscenity on the part of Douglas. But an important distinction should be made between the favorable personal attitude reflected in the Ralph Ginzburg case and the unfavorable personal attitude reflected in the Sam Ginsberg case. In the former, Douglas had voiced a favorable attitude toward specific works; here he asserts that "I find the literature and movies which come to us for clearance exceedingly dull and boring. . . ."[24] Thus, the attitude registered in this case seems to refer to a genre rather than to a specific work.

Douglas's judicial attitude, though, was in the favorable column now. This dissent, in which Hugo Black concurred, was one of his most memorable. Two of Douglas's best-known statements are found in Ginsberg. His gift for simplicity was evident in the statement: "As I read the First Amendment, it was designed to keep the state and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature."[25] Douglas's understated sense of humor also came through in the Ginsberg case. After an aside to the effect that the juvenile delinquents he had known were "mostly over 50 years of age,"[26] he concluded his dissent by suggesting that,

> Today this Court sits as the Nation's board of censors. With all respect, I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on the minds of either young or old.[27]

In the five years from 1968 to mid-1973 Douglas wrote four more dissents[28] dealing with obscenity and pornography. All of them were judged to be *Personally Neutral* and *Judicially Favorable*. But in June, 1973, two cases came before the Court (along with a third, in which he was personally neutral) which contained the strongest language Douglas would ever use to lodge a personal attitude about obscenity and pornography. Both cases reflected his attitude as being unfavorable to the literature.

The first was United States v. 12 200-FT. Reels of Super 8mm Film (413 US 123). Although Justice Douglas opened his dissent by asserting that he could think of "no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents"[29] and that "Jefferson and Madison would be appalled at what the Court espouses today,"[30] he went on to proclaim that "most of the items that come this way denounced as 'obscene' are in my view trash. I would find few, if any, that had by my standards any redeeming social value."[31] What Douglas seems to be suggesting here is that he cared as little for judicial criteria for defining obscenity as he did for obscenity itself. What he was interested in was protecting the First Amendment's purity; that when it says "no law," that is what it means.

In the other case appearing that day, Paris Adult Theatre v. Slaton (413 US 49), Douglas was no less clear in stating his personal distaste for the genre. He first said he was sure he "would find offensive most of the books and movies charged with being obscene."[32] He further revealed that "as a parent or priest or teacher I would have no compunction in edging my children or wards away from the books and movies that did no more than excite man's base instincts."[33] From the content of these two cases, the last in which an unfavorable attitude was found, the conclusion seems warranted that Douglas was personally unfavorable toward the genre of obscenity and pornography.

The two cases just discussed were companion cases to the landmark Miller v. California (413 US 15), which contained the last of Douglas's detailed dissents on obscenity and pornography. His personal attitudes did not enter into his opinion, but his judicial philosophy was never stated more strongly in favor of broad First Amendment sweep than in the Miller decision. An air of resignation to the social attitudes inherent in a "community standards" criterion seems to be heard in Douglas's statement that "the idea that the First Amendment permits punishment for ideas that are offensive to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed."[34] During the next four months three more cases[35] dealing with obscenity and pornography came before the Court in which Douglas participated. He dissented in favor of the First Amendment each time but remained personally neutral in all of them.

Almost exactly a year after Miller v. California came Hamling v. United States (418 US 87). This case involved the conviction of the publishers of an illustrated edition of the Report of the President's Commission on Obscenity. Mr. Justice Rehnquist, in his first opportunity to write an opinion in this area, penned a fifty-page treatise, to which Mr. Justice Douglas responded with two paragraphs. The opinion seems to reflect a favorable personal attitude when Douglas argues that "sex is more important to some than to others, but it is of some importance to all. If officials may constitutionally report on obscenity I see nothing in the First Amendment that allows us to bar the use of a glossary factually to illustrate what the report discusses."[36]

Three cases in the next six months reflected the predominant pattern of *Personally Neutral* and *Judically Favorable*. Then, on March 18, 1975, Douglas wrote his last opinion dealing with the concepts of obscenity and pornography.

Southeastern Promotions, Ltd., a theatrical producer, was refused a permit to produce the musical "Hair" in a municipal theater in Chattanooga, Tennessee. Thereupon Southeastern requested injunctive relief in U.S. District Court for the Eastern District of Tennessee. The District Court denied both temporary and permanent injunctions, and the Fifth Circuit Court of Appeals upheld the judgment. On certiorari the Supreme Court reversed in a per curiam decision, holding that because city officials lacked minimal procedural safeguards against violation of First Amendment rights their action in denying the permit had been an unconstitutional prior restraint on freedom of expression. Naturally Douglas was in the majority, but he felt compelled to write a separate opinion. As with many of the opinions during his last few months on the bench this one was brief, only a page in length. However, it illustrates his position and the conclusions of this paper. He wrote

> . . . I am compelled to write separately in order to emphasize my view that the injuries inflicted upon petitioner's First Amendment rights cannot be treated adequately or averted in the future by the simple application of a few procedural band-aids. The critical flaw in this case lies, not in the absence of procedural safeguards, but rather in the very nature of the content screening in which respondents have engaged.[37]

Douglas simply would not accept an abridged edition of the First Amendment, regardless of what procedural safeguards were employed to implement it. There is no case in which the rationale behind Douglas's attitude toward a piece of literature charged with obscenity is made clearer than in the case of "Hair." He wrote:

> There was much testimony in the District Court concerning the pungent social and political commentary which the musical "Hair" levels against various sacred cows of our society: the Viet Nam war, the draft, and the puritanical conventions of the Establishment. This commentary is undoubtedly offensive to some, but its contribution to social consciousness and intellectual ferment is a positive one. In this respect, the musical's often ribald humor and trenchant social satire may someday merit comparison to the most highly regarded works of Aristophanes, a fellow debunker of established tastes and received wisdom, yet one whose offerings would doubtless meet with a similarily cold reception at the hands of Establishment censors.[38]

Conclusions

The purpose of this study was to trace the position of Justice William O. Douglas toward the concepts of obscenity and pornography along the dimensions of personal attitude and judicial attitude and to attempt to pull together some generalizations regarding those attitudes. The generalizations that seem warranted are: (1) From some time after 1951 Douglas was exclusively in favor of extending First Amendment coverage to obscenity and pornography. In only two cases in his career--Hannegan v. Esquire and Dennis v. United States--did he give any indication of an unfavorable judicial attitude toward obscenity and pornography. (2) Most of his decisions, (eighteen of twenty-four) contain no language that seems to reveal either clearly favorable or unfavorable personal attitudes toward obscenity and pornography. (3) Perhaps the most revealing finding in this study has to do with the nature of the six decisions in which he revealed a personal bias. In each of the three cases in which he registered a favorable attitude the attitude referred to a specific work of literature; in each of the three in which Douglas registered an unfavorable attitude it referred to obscenity and pornography as a genre. It is clear that Douglas was not, as one of his severest critics suggested, "almost totally committed to support . . . pornographers and other immoral elements."[39] Perhaps the most straightforward exposition of Douglas' personal and judicial attitudes on obscenity and pornography is the one he himself offered in Byrne v. Karalexis (396 US 976) in 1969. The case dealt with the film "I Am Curious (Yellow)." Douglas's dissent supports the conclusions arrived at in this paper by a more circuitous route:

> Underlying the state and federal case is an important First Amendment question. Some people think that 'obscenity' is not protected by the Free Speech and Free Press Clauses of the First Amendment. They believe that both Congress and the States can set up regimes of censorship to weed out 'obscenity' from literature, movies, and other publications so as to rid the press of what they, the judges, deem to be beyond the pale.
>
> I have consistently dissented from that course, *but not because, as frequently charged, I relish 'obscenity.' I have dissented before and now because I think the First Amendment bars all kinds of censorship*[40] (emphasis added).

Footnotes

[1] William O. Douglas, Go East, Young Man (New York: Random House, 1974) p. 459.

[2] Douglas, Go East, Young Man, pp. 462-463.

[3] Erwin N. Griswold, Introduction to Bernard Wolfman, J.L. Silver, and M.A. Silver, Dissent Without Opinion (Philadelphia: University of Pennsylvania Press, 1973), p. x.

[4] Griswold, Introduction to Wolfman, Wolfman, and Silver, Dissent Without Opinion, p.x.

[5] Vern Countryman, The Judicial Record of Justice William O. Douglas (Cambridge: Harvard University Press, 1974), p. 3.

[6] Morris L. Cohen, Legal Research (St. Paul, Minn.: West Publishing Co., 1971), p. 40.

[7] Cohen, Legal Research, p. 40.

[8] LEXIS, A Primer (Dayton, Ohio: Mead Data Central, Inc., 1975), p. 1.

[9] Legal Research and the Computer (Dayton, Ohio: Mead Data Central, Inc.), p. 4.

[10] *LEXIS, A Primer*, pp. 3-14.

[11] *Dennis v. United States*, 341 U.S. at 681.

[12] Harold Lasswell, Daniel Lerner, and Ithiel deSola Pool, *The Comparative Study of Symbols* (Stanford: Stanford University Press, 1952) quoted in Richard W. Budd, Robert K. Thorp, and Lewis Donohew, *Content Analysis of Communications* (New York: The Macmillan Company, 1967), p. 50.

[13] Budd, Thorp, and Donohew, p. 50.

[14] Charles E. Osgood, "The Representational Model and Relevant Research Methods," in Ithiel deSola Pool, ed., *Trends in Content Analysis* (Urbana: University of Illinois Press, 1959), pp. 30-55.

[15] *Hannegan v. Esquire*, 327 U.S. at 148.

[16] *Hannegan v. Esquire*, 327 U.S. at 150.

[17] *Hannegan v. Esquire*, 327 U.S. at 151.

[18] *Hannegan v. Esquire*, 327 U.S. at 158.

[19] *Dennis v. United States*, 341 U.S. at 581.

[20] *Ginzburg v. United States*, 383 U.S. at 464-476.

[21] *Ginzburg v. United States*, 383 U.S. at 482.

[22] *Ginzburg v. United States*, 383 U.S. at 488.

[23] *Jacobs v. New York*, 388 U.S. at 437.

[24] *Ginsberg v. New York*, 390 U.S. at 655.

[25] *Ginsberg v. New York*, 390 U.S. at 655.

[26] *Ginsberg v. New York*, 390 U.S. at 654-655.

[27] *Ginsberg v. New York*, 390 U.S. at 656.

[28] These were: *Byrne v. Karalexis*, 396 U.S. 976, *Dyson v. Stein*, 401 U.S. 200, *Council v. School Board*, 409 U.S. 998, and *United States v. Orito*, 413 U.S. 139.

[29] *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. at 130.

[30] *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. at 132.

[31] *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. at 137.

[32] *Paris Adult Theatre v. Slaton*, 413 U.S. at 71.

[33] *Paris Adult Theatre v. Slaton*, 413 U.S. at 72.

[34] *Miller v. California*, 413 U.S. at 44.

[35] These are: *Heller v. New York*, 413 U.S. 483, *Trinker v. Alabama*, 414 U.S. 955, and *Carlson v. Minnesota*, 414 U.S. 953.

[36] *Hamling v. United States*, 418 U.S. at 141.

[37] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 462.

[38] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 462.

[39] H.E. McBride, Impeach Justice Douglas (New York: Exposition Press, 1971), p. 110.

[40] Byrne v. Karalexis, 396 U.S. at 979.

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David Eshelman
Central Missouri State University

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Court Cases

Note: In addition to the use of regional and federal reporters for state and federal cases a recently established case-law source which provides weekly advance sheets and evaluations of important state and federal developments in the field of communications law is now available. The *Media Law Reporter* is published by the Bureau of National Affairs, Inc., 1231 25th Street, N.W., Washington, D.C. 20037, and covers issues of prior restraint, newsgathering, right of access, free press, fair trial, obscenity, defamation, privacy, and communications ownership.

Abood v. Detroit Board of Education, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977). The union's use of "agency shop" fees collected from nonunion government employees for bargaining purposes was held not violative of First Amendment. 9-0 decision to remand the case on other grounds, but three justices would have held that compelled contributions impinged on interests in free speech and association protected by the First Amendment.

Bates v. State Bar of Arizona, 53 L.Ed.2d 810, 97 S.Ct. 2691 (1977). The Arizona State Bar rule prohibiting commercial advertising of routine legal services by lawyers was held unconstitutional as violative of the First Amendment. 5-4 decision on this issue of the case.

Carey v. Population Services International, 52 L.Ed.2d 675, 97 S.Ct. 2010 (1977). The New York statutory prohibition of all advertisements or displays of contraceptives was an unconstitutional suppression of commercial speech protected by the First Amendment. 7-2 decision on the First Amendment issue, but with divergent reasons for and against the several issues raised in this case.

Gruner v. Superior Court of California, 50 L.Ed.2d 44, 97 S.Ct. 7 (1976). Application of newspaper editors and reporters for stay of commitment orders under state contempt judgments for refusing to reveal sources of information regarding grand jury testimony denied by Justice Rehnquist.

Houchins v. KQED, Inc., 50 L.Ed.2d 733, 97 S.Ct. 773 (1977). The application of a sheriff for stay, sending certiorari by the Supreme Court of an injunction against exclusion of news media from jail tours, granted by Justice Rehnquist. Certiorari granted, 53 L.Ed.2d 243, 97 S.Ct. (1977) to determine whether the news media may have access to tours of jail facilities on the same basis as the public.

Jones v. North Carolina Prisoners' Labor Union, 53 L.Ed.2d 629, 97 S.Ct. 2532 (1977). Prison rules prohibiting inmates from soliciting other inmates to join a prisoners' union, barring meetings of such a union, and prison refusal to deliver mailed packets of union publication did not violate the speech and associational rights guaranteed by the First Amendment: 7-2 decision.

Linmark Associates, Inc. v. Township of Willingboro, 52 L.Ed.2d 155, 97 S.Ct. 1614 (1977). Township ordinance prohibiting posting of "For Sale" and "Sold" signs on real estate held violative of First Amendment: 8-0 decision.

Madison School District v. Wisconsin Employment Relations Commission, 50 L.Ed.2d 376, 96 S.Ct. 421 (1976). Wisconsin Employment Relations Commission order prohibiting teachers, other than teachers' union representatives, from speaking at a public meeting of a public-school board on pending collective-bargaining agreement, held violative of First Amendment: 8-0 decision.

Marks v. United States, 51 L.Ed.2d 260, 97 S.Ct. 990 (1977). The retroactive application of the Miller decision's obscenity standards held violative of due-process clause to the extent that criminal liability was imposed for conduct not punishable at the time of the action when standards were derived from the Memoirs decision. 8-0 decision with four justices concurring in part and dissenting in part.

Mt. Healthy City Board of Education v. Doyle, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977). The school board's refusal to rehire an untenured teacher, based in part on teacher's conduct protected by the First Amendment, was held not to warrant remedial action if the board would have reached the same decision based on other considerations: 8-0 decision.

National Socialist Party of America v. Village of Skokie, 53 L.Ed.2d 96, 97 S.Ct. 2205 (1977). County Circuit Court injunction prohibiting certain individuals from parading and pamphleterring held improper: 5-4 decision.

Nixon v. Administrator of General Services, 53 L.Ed.2d 867, 97 S.Ct. 2777 (1977). Congressional act directing the General Services Administrator to control ex-President Nixon's papers and tapes was held not violative of presidential privilege or privacy and association rights.

Oklahoma Publishing Co. v. District Court, 51 L.Ed. 2d 355, 97 S.Ct. 1045 (1977). State-court order barring publication of identity of juvenile identified in open pretrial detention hearing and charged with delinquency by murder held violative of First Amendment: 8-0 decision.

Smith v. United States, 52 L.Ed.2d 324, 97 S.Ct. 1756 (1977). The court affirmed that it was not a requirement to ask prospective jurors questions relating to community standards in an intrastate case based on mailing of obscene materials: 5-4 decision.

Splawn v. California, 52 L.Ed.2d 606, 97 S.Ct. 1987 (1977). Procedural aspects in this obscenity case, which included pandering instructions authorized by statute enacted after occurrence of part of the defendant's conduct, were held not violative of First and Fourteenth Amendments: 5-4 decision.

United States v. Ramsey, 52 L.Ed.2d 617, 97 S.Ct. 1972 (1977). U.S. customs official search of incoming international mail was held authorized by 19 USCS section 482 and not violative of Fourth Amendment: 6-3 decision.

Ward v. Illinois, 52 L.Ed.2d 738, 97 S.Ct. 2085 (1977). An Illinois obscenity statute as applied to sado-masochistic materials was held not to be unconstitutionally vague or overbroad: 5-4 decision.

Whalen v. Roe, 51 L.Ed.2d 64, 97 S.Ct. 869 (1977). New York statute requiring doctors to identify certain prescription-drug patients for recording in computer file, held not unconstitutional on privacy grounds: 8-0 decision.

Wolman v. Walter, 53 L.Ed.2d 714, 97 S.Ct. 2593 (1977). Ohio statute for aid to nonpublic-school students by furnishing texts, standardized testing services, and diagnostic and therapeutic services was held constitutional; furnishing instructional materials and equipment and field-trip services was held unconstitutional under First Amendment establishment-of-religion clause. The court was widely divided on these issues of the case.

Wooley v. Maynard, 51 L.Ed.2d 752, 97 S.Ct. 1428 (1977). The court affirmed that the State of New Hampshire could not enforce criminal sanctions against those who obscured the state motto ("Live Free or Die") from the noncommercial-vehicle license since such motto could not be justified as facilitating the identification of passenger vehicles or as promoting an appreciation of history, individualism, and state pride. 6-3 decision.

Zacchini v. Scripps-Howard Broadcasting Co., 53 L.Ed.2d 965, 97 S.Ct. 2849 (1977). Television station which broadcast performer's entire act on news program without his consent was held not immune from liability under the First Amendment. 5-4 decision.